90-1934

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRIUMPH TANKERS LTD.,

Petitioner,

—v.—

KERR-McGEE REFINING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH C. SMITH
BURLINGHAM UNDERWOOD & LORD
One Battery Park Plaza
New York, New York 10004
(212) 422-7585

Counsel of Record for Petitioner

Of Counsel

R. SCOTT ERVIN
BURLINGHAM UNDERWOOD & LORD

Dated: June 17, 1991

QUESTIONS PRESENTED

1. Where a vessel owner agreed to arbitrate only those disputes "arising out of" a voyage charter party covering the carriage of a single cargo of crude oil to the United States, whether the arbitrators exceeded their powers by awarding damages for a claim based on events and disputes arising out of voyages not covered by the charter?

If the arbitrators did not exceed their authority,

2. Whether the Second Circuit erred in holding that the arbitrators could award treble damages under the Racketeering Influenced and Corrupt Organizations Act based on a "pattern" consisting of just one "racketeering act"?

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TRIUMPH TANKERS LTD.,

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KERR-McGEE REFINING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Triumph Tankers, Ltd.[1] ("Triumph") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit dated January 28, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 924 F.2d 467 and is reprinted in the Appendix ("App.") at pages 1a-11a.

The memorandum decision of the United States District Court for the Southern District of New York (Conner, D.J.)

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1 Pursuant to Supreme Court Rule 29.1, Triumph Tankers Ltd. states that it has no corporate parent or subsidiary.

has not been reported. It is reprinted in the Appendix at pages 12a-18a.

JURISDICTIONAL STATEMENT

This action was commenced by Respondent Kerr-McGee Refining Corporation ("Kerr-McGee") in 1984 as an attachment proceeding under Admiralty Rule B in the United States District Court for the Southern District of New York. Federal jurisdiction was invoked under 28 U.S.C. §1332 and § 1333. The action was stayed pending arbitration, and upon completion of the arbitration in 1990, Kerr-McGee moved pursuant to the Federal Arbitration Act to confirm the two awards issued by the arbitrators. Triumph cross-moved to vacate the awards. By memorandum decision dated July 24, 1990 the District Court confirmed the Partial Final Award and directed that judgment be entered thereon, and vacated the Final Decision and Award.

Thereafter, Kerr-McGee appealed from that portion of the District Court's decision which vacated the arbitrators' Final Award and Triumph cross-appealed from that portion of the court's decision which confirmed the arbitrators' Partial Final Award. Both the appeal and the cross-appeal were pursuant to 28 U.S.C. § 1291. By decision dated January 28, 1991 the United States Court of Appeals for the Second Circuit affirmed the District Court's confirmation of the Partial Final Award but reversed the vacatur of the Final Award ("Second Circuit Decision").

On February 11, 1991 Triumph filed a Petition for a Rehearing of the Second Circuit Decision, with a Suggestion for Rehearing in Banc. The Petition was denied on March 19, 1991, (App., 19a), and on April 12, 1991, the District Court entered judgment on the Final Award.

This Court has jurisdiction to review the Second Circuit Decision pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 10 of the Federal Arbitration Act provides:

> In either of the following cases the United States court in and for the district where the award was made may make an order vacating the award upon application of any party to the arbitration—
>
> * * *
>
> (4) Where the arbitrators exceeded their powers, . . .

9 U.S.C. § 10(4) (1991).

Section 1961 of the Federal Racketeering Influenced and Corrupt Organizations Act provides:

> As used in this chapter—
>
> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of Title 18, United States Code: . . . section 659 (relating to theft from interstate shipment) . . .
>
> * * *
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity . . . .

18 U.S.C. § 1961 (1), (5).[2]

STATEMENT OF THE CASE

This dispute arises out of a single voyage charter party (the "Charter") dated March 5, 1984 between Triumph, as owner of M/T TRIUMPH, and Kerr-McGee as charterer. The Charter was for the carriage of a cargo of crude oil from the United Kingdom to U.S. East Coast or Gulf ports, and provided for arbitration of all disputes "arising out of" the Charter.

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2 The full text of Section 1961 of the RICO Act is set out in the Appendix at pages 47a-49a.

On March 9, 1984, TRIUMPH loaded 539,999 net barrels of Beatrice Crude oil at Nigg Oil Terminal in England. The vessel sailed on March 10, and arrived at the discharge port, Corpus Christi, on March 28, 1984. Upon arrival at Corpus Christi, the amount of cargo on board was calculated by a cargo surveyor appointed by Kerr-McGee to be 538,250.09 barrels. Following discharge, shore tank gaugings by the surveyor indicated that a total of 528,060.65 net barrels had been received from the vessel. On the basis of these measurements, Kerr-McGee alleged short delivery of the cargo and withheld freight due to Triumph in the amount of $213,000.

In 1984, Triumph commenced arbitration to recover the 10% balance of freight withheld by Kerr-McGee. Kerr-McGee subsequently paid the freight due to Triumph, but counterclaimed in the arbitration for $150,638.59 as damages for short delivery of 4,835.91 barrels of cargo. Following several hearings, Kerr-McGee increased the amount of its claim for shortage to 11,938.35 barrels. In addition, Kerr-McGee alleged that Triumph was part of an "enterprise" engaged in a systematic pattern of cargo conversion onboard TRIUMPH and several other vessels not owned by Triumph, and added separate claims in the arbitration for punitive damages, for treble damages based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") and for attorneys' fees and costs.

On September 7, 1988, the Panel issued an interim award on the shortage claim (the "Partial Final Award") which determined the quantity of cargo short-delivered, awarded Kerr-McGee damages plus interest for that amount and apportioned the arbitrators' fees between the parties. The Panel reserved consideration of the claims for punitive damages, RICO damages, and the claim for attorneys' fees and costs, and requested the parties to submit briefs on those remaining claims.

On March 28, 1990, the Panel issued its Final Decision and Award (the "Final Award"), in which a majority of the arbitrators found that Triumph had converted cargo onboard

TRIUMPH and that the conversion was "part of a pattern sufficient to satisfy the requirements of civil liability under . . . RICO." App., 29a. Accordingly, the majority awarded Kerr-McGee an additional $512,520.10, as treble damages under RICO, costs of the arbitration and legal fees. The arbitrators' finding of a "pattern" of activity was based on a single "racketeering act," namely the conversion of cargo during the voyage by TRIUMPH. In finding a RICO "pattern," the arbitators also referred to Kerr-McGee's unproven allegations of shortages on prior voyages of TRIUMPH and to events transpiring onboard TRISUN, TRILIGHT, TRIAD and TRISTAR, (App., 27a-28a), four vessels which the Panel acknowledged were owned by parties other than Triumph. App., 28a. Neither the prior voyages of TRIUMPH nor the other four vessels were covered by the Charter.

The District Court confirmed the Partial Final Award but vacated the Final Award because the panel majority exceeded its power by resolving claims not within the scope of its authority. Specifically, the District Court held that:

> because the parties agreed to arbitrate only those claims "arising out of" the Charter, the panel majority exceeded its powers in looking to occurrences on other voyages in finding a pattern and enterprise to satisfy the elements of RICO and was accordingly without authority to award RICO damages on that basis.

App., 18a.

On appeal, the Second Circuit found that the arbitration panel had acted within the scope of the arbitration clause and that the District Court erred by not confirming the Final Award. *Kerr-McGee Refining Corporation v. M/T TRIUMPH*, 924 F.2d 467, 471 (2d Cir. 1991); App., 2a. Accordingly, the Second Circuit reversed and directed the District Court to confirm the Final Award. This petition followed.

REASONS FOR GRANTING THE WRIT

I. IF ALLOWED TO STAND, THE SECOND CIRCUIT DECISION WILL UNDERMINE ESTABLISHED PRINCIPLES OF LAW GOVERNING THE ARBITRATION ACT AND THE RICO ACT

The Second Circuit Decision directly conflicts with the statutory provisions of the Arbitration Act, 9 U.S.C. §§ 1-14 and the RICO Act, 18 U.S.C. §§ 1961-1968, as well as case law interpreting such provisions. If upheld, the Decision will cast doubt on the continued validity of the established principles of law governing these statutes and lay a foundation for much unnecessary litigation in the future. Certiorari should be granted to preserve the hard-won uniformity of law relating to these two widely used federal statutes. Moreover, the Second Circuit Decision violates accepted principles of Due Process and it must not be allowed to stand.

II. THE SECOND CIRCUIT HELD THAT THE ARBITRATORS HAD AUTHORITY TO RESOLVE CLAIMS BEYOND THE SCOPE OF AUTHORITY GRANTED BY THE PARTIES' AGREEMENT

It has long been settled that arbitration is a matter of contract and that arbitrators may only resolve claims which the parties have agreed to submit to them. *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648 (1985); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *McAllister Bros. v. A & S Transport Co.*, 621 F.2d 519, 522 (2d Cir. 1980). The Arbitration Act codifies this principle, permitting the court to vacate an award where "the arbitrators exceeded their powers . . . ." 9 U.S.C. § 10(4).

Ignoring this principle, the Second Circuit held that since RICO claims in general are arbitrable,

> we see no reason here for limiting arbitrability to those situations in which all of the necessary prior conduct

> giving rise to RICO liability is governed by an agreement to arbitrate.

TRIUMPH, 924 F.2d at 471; App., 9a. The Second Circuit holding allows the arbitrators, under the guise of a RICO claim, to resolve disputes beyond the scope of authority granted to the arbitrators by the parties' agreement.

In this case, the arbitrators found only one "racketeering act" to have arisen out of the voyage covered by the Charter party, namely, the conversion of cargo. The arbitrators then relied on allegations of shortages on prior voyages and events on other vessels not owned by Triumph to find evidence of a "pattern" of racketeering activity. This required making legal and factual determinations regarding events and disputes arising out of voyages unrelated to the subject Charter and with respect to other vessels not in Triumph's control.

The Second Circuit reasoned that the arbitrators "should be able to consider any conduct of the parties that bears on the damages appropriate for a covered dispute." *TRIUMPH*, 924 F.2d at 470; App., 8a. However, in looking beyond the voyage covered by the Charter to find the necessary acts to support a pattern under RICO, the arbitrators were not just considering damages—they were determining the substantive elements necessary to support a RICO cause of action. The arbitrators could not get to the question of RICO damages until they had found RICO liability, and here, the elements necessary to establish that liability did not "arise out of" the Charter. They arose "out of" voyages covered by other charters, involving vessels not owned or controlled by Triumph.

District Judge Conner recognized that such adjudication in respect of prior voyages of TRIUMPH or other vessels was *ultra vires* on the arbitrators' part, and acted properly in vacating the Final Award. That decision should be reinstated.

The Second Circuit also reasoned that if Triumph's argument were carried to its logical extreme, "a RICO claim could not be arbitrated except in the rare instance in which all the predicate acts occurred on a single voyage."

TRIUMPH, 924 F.2d at 470; App., 8a. Citing to this Court's holding in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), the Second Circuit stated that,

> [w]e do not believe that the [Supreme] Court, in approving arbitration for RICO claims, thought it was creating a RICO arbitration forum only for situations in which all acts constituting the pattern (and the enterprise) arise under an agreement to arbitrate . . . . Since RICO claims are arbitrable, we see no reason here for limiting arbitrability to those situations in which all the necessary prior conduct giving rise to RICO liability is governed by an agreement to arbitrate.

TRIUMPH, 924 F.2d at 471; App., 8a-9a.

First, a distinction must be drawn between voyage charters (such as the one involved here), which cover only a single voyage, and time or bareboat charters which cover multiple voyages over an extended period. It is only in cases involving the former types of charters that all predicate acts must occur during a single voyage; a situation which may not be all that rare. *E.g.*, *Trade & Transport, Inc. v. Valero Refining Co. (M/T LAUBERHORN)*, S.M.A. No. 2699 (1990).

Second, Triumph has never contended that as a general matter, RICO claims are not arbitrable; *McMahon* settled that question. But the inquiry does not end there. An arbitral award on any claim, be it for breach of contract, for a pattern of conduct under RICO or for punitive damages, remains subject to review for fraud, bias, prejudicial misconduct or excess of authority under Section 10 of the Federal Arbitration Act. In *McMahon*, this Court did not address the application of the Arbitration Act in the context of a RICO case, and, since the RICO claim there was based on events expressly covered by the parties' contract, the Court did not reach the issue presented in this case. Certainly, there is no indication in *McMahon* that this Court meant to narrow the statutory grounds for review of arbitral awards.

The basis for the Second Circuit's belief that this Court does not require all acts supporting a RICO pattern to "arise out of" the agreement to arbitrate is uncertain, particularly since this Court has confirmed that arbitrators err when they exceed the scope of their authority. *United Steelworkers of America v. Warrior & Gulf Navigation, Co.*, 363 U.S. 574, 582 (1960). If the Second Circuit Decision is upheld, the effect will be to virtually immunize arbitral awards involving RICO from judicial review under the "excess of powers" doctrine. Nothing in either the RICO Act or the Arbitration Act supports such a result. The Court should grant certiorari to review the Second Circuit's conclusion that the long-standing principle that arbitrators are limited by the scope of the parties' arbitration agreement does not apply in arbitrations involving the RICO statute.

III. THE SECOND CIRCUIT HELD THAT IN ARBITRATION, A RICO "PATTERN" CAN BE BASED ON JUST ONE "RACKETEERING ACT"

In the event that the Court concludes that the arbitrators did not exceed their powers in resolving claims arising out of events not covered by the Charter, the Court should still review the new standard set by the Second Circuit for liability under RICO in the context of arbitration.

The RICO statute and relevant case law holds unequivocally that liability under RICO requires a finding of a "pattern" based on at least two acts of "racketeering activity." 18 U.S.C. § 1961(5). *See H.J. Inc. v. Northwestern Bell Telephone Company*, 57 U.S.L.W. 4951, 4953 (1989); *U.S. v. Indelicato*, 865 F.2d 1370, 1381 (2d Cir. 1989).

Here, the arbitrators identified the conversion of cargo by TRIUMPH during the voyage to Corpus Christi as one racketeering act in violation of 18 U.S.C. § 659. But the arbitrators did not identify a second "racketeering act" in support of their finding of a RICO pattern, merely concluding that the conversion was "part of a pattern sufficient to satisfy the requirements of civil liability under . . . RICO." App., 29a.

By upholding this award, the Second Circuit has created a new standard for RICO claims in arbitration. Under this new principle of law, arbitrators need not find the two statutorily required predicate acts to award treble damages under RICO, but may rely instead on one predicate act coupled with allegations of "prior misconduct."

In its recitation of the facts, the Second Circuit stated that the arbitrators found,

> that there was evidence of four other substantial shortages in crude oil cargo carried by the vessel over a two-year period; that the managing company of the chartered vessel also managed, but did not own, four other vessels in the same group as the chartered vessel; that one of the vessels was found to have converted crude oil cargo in a similar manner during a voyage; and that three of the vessels were suspected of doing so.

TRIUMPH, 924 F.2d at 469; App., 5a. The court concluded that the arbitrators had found evidence of two sorts of misconduct—alleged shortages on previous voyages of TRIUMPH and events alleged to have occurred on other vessels. None of this "evidence," however, establishes that Triumph has committed a second racketeering act triggering RICO liability.

Any reliance by the arbitrators (or the Second Circuit) on the alleged conversion of cargo on TRIAD, TRISUN, TRILIGHT and TRISTAR was improper. The arbitrators discussed events occurring on these other vessels as part of their RICO "pattern" analysis, (App., 28a & n. 14), however, these vessels were not owned, operated or managed by Triumph, and Triumph was not shown to have any ownership interest or responsibility for them. The only link among the vessels found by the arbitrators was that they were all managed by the same company. App., 28a. That management company was not a party to the arbitration and was not shown to have any connection to Triumph. Triumph has independent corporate status, and absent evidence sufficient to "pierce the corporate veil," cannot be held vicariously lia-

ble for another's actions. *See Puma Industrial Consulting, Inc. v. Daal Associates, Inc.*, 808 F.2d 982, 986 (2d Cir. 1987).

If the Second Circuit Decision is upheld, Triumph will be forced to pay damages for the alleged misconduct of unrelated third parties occurring on vessels over which it had no control. Such a result would violate fundamental Due Process principles, because Triumph is only liable for its own actions. For this reason alone, the Second Circuit Decision must be set aside. The "rules of due process and other constitutional protections must extend to [arbitration]." *Dewey v. Reynolds Metal Co.*, 291 F. Supp. 786, 790 (W.D. Mich. 1969); *Amalgamated Food v. Great A & P Co.*, 415 F.2d 185, 189 (3rd Cir. 1969).

Similarly, although the Second Circuit referred several times to Triumph's alleged "prior practice" and its "misconduct" on "other voyages," *TRIUMPH*, 924 F.2d at 470-71; App., 8a, the record contains no evidence of "racketeering activity" occurring on TRIUMPH's prior voyages. At most, the arbitrators stated that they were presented with allegations of shortages occurring on the vessel's previous voyages. However, allegations of short delivery of cargo on previous voyages are not equivalent to racketeering acts under RICO; to qualify as such a racketeering act, there must be a finding that, for example, the shortage resulted from conversion of cargo in violation of 18 U.S.C. § 659. The arbitrators made no such finding with respect to the prior voyages.

To find a second racketeering act based on TRIUMPH's prior voyages, the arbitrators would have had to make a determination that there was in fact a shortage on a prior voyage, that such shortage resulted from conversion of cargo and was within the RICO definition of a "racketeering act" and, finally, that Triumph was responsible for that theft. Not only did the arbitrators make no such finding, but as discussed above, the arbitrators only had the authority to make such determinations with respect to disputes "arising out of"

the voyage covered by the Charter, not with respect to previous voyages under other charters.

By ordering the confirmation of the Final award, the Second Circuit has established a new rule for RICO arbitrations; the arbitrators can base liability under the Act on just one predicate act, notwithstanding the express provisions of the statute that a pattern of racketeering activity "requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). Certiorari should be granted so that this Court can review this new standard for RICO liability in the arbitration context.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be GRANTED.

Dated: June 17, 1991

Respectfully submitted,

JOSEPH C. SMITH
BURLINGHAM UNDERWOOD
& LORD
One Battery Park Plaza
New York, New York 10004
(212) 422-7585

Counsel of Record
for Petitioner

Of Counsel

R. SCOTT ERVIN
BURLINGHAM UNDERWOOD & LORD

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 820, 978—August Term 1990

Argued: January 7, 1991 Decided: January 28, 1991

Docket Nos. 90-7778, -7800

KERR-MCGEE REFINING CORPORATION,

Plaintiff-Appellant,
Cross-Appellee,

—against—

M/T TRIUMPH, her boilers, tackle, etc.,

Defendant-Appellee,

TRIUMPH TANKERS, LTD.,

Defendant-Appellee,
Cross-Appellant.

Before:

FEINBERG, NEWMAN and MCLAUGHLIN,
Circuit Judges.

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York, William C. Conner, J., confirming an arbitration panel's Partial Final Award but vacating the panel's Final Award on the ground that the panel exceeded its authority under the arbitration agreement.

Reversed in part and affirmed in part.

JOHN P. VAYDA, New York, NY (Nourse & Bowles, Maria L. Alonso, Peter T. Jensen, of Counsel), for Plaintiff-Appellant, Cross-Appellee.

R. SCOTT ERVIN, New York, NY (Burlingham, Underwood & Lord, Joseph C. Smith, of Counsel), for Defendant-Appellee, Cross-Appellant.

FEINBERG, *Circuit Judge*:

Plaintiff Kerr-McGee Refining Corp. (Kerr-McGee) appeals from a judgment entered in accordance with an order of the United States District Court for the Southern District of New York, William C. Conner, J., dated July 10, 1990, vacating an arbitration panel's Decision and Final Award, dated March 28, 1990, which awarded Kerr-McGee treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68. The principal question on appeal is whether the arbitration panel exceeded its authority under a voyage charter party (the Charter) because the

panel considered evidence of voyages not covered by the Charter as proof of the "pattern" and "enterprise" elements of a RICO violation. Judge Conner's July 1990 order (and the subsequent judgment) also confirmed a Partial Final Award issued by the arbitration panel on September 7, 1988. Defendant Triumph Tankers, Ltd. (Triumph) cross-appeals from that portion of the district court's judgment. For reasons given below, we reverse the judgment with respect to the March 1990 Final Award and affirm with respect to the September 1988 Partial Final Award.

Background

The Charter was entered into in March 1984 by Kerr-McGee, as charterer, and Triumph, as owner of the vessel. Later that month, Triumph loaded 539,999 net barrels of crude oil at a terminal in Scotland, and this amount was incorporated into a bill of lading that showed Kerr-McGee as consignee at Corpus Christi, Texas. When the vessel arrived at Corpus Christi and the oil was discharged, Kerr-McGee's measurements showed that only 528,060.65 net barrels had been received from the vessel. Kerr-McGee accordingly alleged short delivery of cargo and withheld freight in the amount of $213,000 to cover the alleged shortage.

Triumph then sought arbitration to recover the balance of the freight withheld by Kerr-McGee, since the Charter required that "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration." Kerr-McGee subsequently paid the freight balance, but counterclaimed in the arbitration for damages resulting from the alleged short delivery.

During the course of the arbitration, Kerr-McGee obtained information, including numerous detailed photographs of the vessel taken while it was being dismantled for scrap metal in China, that showed that a permanent concealed tank had been built into one of the vessel's cargo tanks. The vessel had been further modified to allow oil to be transferred from the cargo tank to the concealed tank. In the words of the arbitration panel, "[w]hat appeared at first sight to be a fairly simple case of a short delivery developed over the seven hearings into a complex matter involving allegations of cargo stealing by this vessel, as well as other vessels operated by the same managers, perjury by the vessel's Chief Engineer, alterations to the Deck and Engine logs, etc." Because of the alleged theft of cargo, Kerr-McGee amended its claim in arbitration to recompute its damages and to seek damages under RICO.

In September 1988, the three-person arbitration panel issued a Partial Final Award in favor of Kerr-McGee for the value of cargo short delivered, together with interest. The arbitrators deferred decision on a number of other issues, including Kerr-McGee's RICO claim, its alternative claim for punitive damages and its claim for attorneys' fees and costs.

In March 1990, the arbitration panel issued its Decision and Final Award, with one arbitrator dissenting. The majority found, among other things, that the modification to the vessel's cargo tank existed at the time of the chartered voyage; that the modification was permanent and was designed to divert cargo on more than one occasion; that 7,497.4 net barrels of Kerr-McGee's cargo was converted in violation of 18 U.S.C. § 659, which deals with theft from interstate or foreign shipments;

that there was evidence of four other substantial shortages in crude oil cargo carried by the vessel over a two-year period; that the managing company of the chartered vessel also managed, but did not own, four other vessels in the same group as the chartered vessel; that one of the vessels was found to have converted crude oil cargo in a similar manner during a voyage; and that three of the vessels were suspected of doing so. The majority accordingly concluded that Triumph had converted Kerr-McGee's cargo through a pattern of racketeering and awarded under RICO treble damages, costs and attorneys' fees, all totalling $512,520.10.

Kerr-McGee then moved in the district court to confirm the Partial Final and Final Arbitration Awards, and Triumph cross-moved to vacate the awards. The district court confirmed the Partial Final Award after finding that it was not time-barred, but vacated the Final Award on the ground that the arbitration panel exceeded its power when it relied upon occurrences on other voyages not covered by the Charter in order to find a "pattern" and "enterprise" as required by RICO. This appeal and cross-appeal followed.

Discussion

A. *The Final Award*

There is no longer any doubt that a RICO claim is arbitrable. See Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 242 (1987). Thus, whether the arbitration panel exceeded its authority under the Charter in imposing RICO liability on Triumph turns solely on the issue of whether the claim was nonarbitrable because it was beyond the intended scope of the arbitra-

tion agreement. In deciding this issue, we are guided by the principle that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, [including problems concerning] the construction of the contract language itself." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). Kerr-McGee argues that the district court did not adhere to this principle when it determined that the RICO claim was outside the scope of the Charter. We agree.

The district court vacated the Final Award on the ground that because the parties agreed to arbitrate only those claims "arising out of" the Charter, the arbitration panel exceeded its authority when it relied on episodes occurring on voyages not covered by the Charter to establish the predicate acts necessary for a RICO violation. We believe that this was too restrictive a construction of the parties' intent as expressed in the Charter that "*[a]ny and all differences and disputes of whatsoever nature* arising out of this Charter shall be put to arbitration" (emphasis added). The dispute here was directly based on a shortage in the fuel oil delivered at the end of the single voyage covered by the Charter. It is true that Kerr-McGee thereafter obtained evidence that the shortage was intentional and part of a prior practice. This evidence, however, did not alter the facts that the dispute arose "out of" the Charter and the damages were inflicted during Triumph's performance under it. Even though the arbitration panel looked at other voyages, it did not determine the liability of a person not party to the contract, as was the case in Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, S.A., 312 F.2d 299 (2d Cir.), cert. denied, 373 U.S. 949 (1963), relied on by Triumph. The

award here imposes liability only on Triumph, a party to the agreement to arbitrate.

Citing Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840 (2d Cir. 1987), Triumph argues that the RICO claim was nonarbitrable. *Genesco* involved a plaintiff that had purchased fabric from the defendants over the years, and made each purchase on a written purchase order form containing an arbitration provision. Plaintiff asserted a RICO claim, and the *Genesco* court held the claim arbitrable because "the predicate acts of [plaintiff's] RICO claim all derive from the parties' transactions under the sales agreements." Id. at 848. Triumph points out that the predicate acts here, in contrast, were not performed under contracts between the parties at all, much less under contracts containing an arbitration clause.

We do not believe, however, that *Genesco* determines the result here, although, if anything, that decision supports the position taken by Kerr-McGee. The panel in that case did look to transactions under a number of sales agreements in determining that a RICO claim could be brought under them, even though each sales agreement provided only for arbitration of "[a]ll claims and disputes of whatever nature arising under *this contract*." 815 F.2d at 845 (emphasis added). There is nothing in *Genesco* suggesting that the arbitration provision in any of the sales agreements expressly applied to disputes arising out of the *series* of agreements. The panel nonetheless held the RICO claim arbitrable, reasoning that "if the allegations underlying the claims 'touch matters' covered by the parties' [arbitration agreement], then those claims must be arbitrated, whatever the legal labels attached to them." 815 F.2d at 846. That same

logic supports the conclusion that Kerr-McGee's RICO claim is arbitrable. Once the parties have agreed to arbitrate disputes arising under an agreement—here the Charter—the arbitrators should be able to consider any conduct of the parties that bears on the damages appropriate for a covered dispute. The dispute here over the oil shortage is clearly arbitrable; the arbitrators could treble that award if its occurrence violated the antitrust laws. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). Or, in an appropriate case, the arbitrators could enhance it by punitive damages if prior misconduct established entitlement to such damages. Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988). Indeed, punitive damages can be awarded because the party on whom they are imposed has repeatedly engaged in the offensive conduct even though the prior dealings did not involve the party claiming punitive damages.

Similarly, the arbitrators here could treble the award if the misconduct was part of a RICO pattern. If Triumph's argument that the arbitrators could not look to what happened on other voyages were carried to its logical extreme, a RICO claim could not be arbitrated except in the rare instances in which all the predicate acts occurred on a single voyage. In general, this court has hardly been overly receptive to civil RICO claims, see Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), or to their arbitrability, see McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986). But the Supreme Court reversed us in both cases, Sedima, 473 U.S. 479 (1985); Shearson, 482 U.S. 220 (1987), and has made it clear that RICO claims are arbitrable. We do not believe that the Court, in approving arbitration for RICO claims, thought it was creating a

RICO arbitration forum only for situations in which all acts constituting the pattern (and the enterprise) arise under an agreement to arbitrate, requiring the parties in other situations to pursue the basic damage claim in arbitration and to sue thereafter for treble damages under RICO in a court. Since RICO claims are arbitrable, we see no reason here for limiting arbitrability to those situations in which all of the necessary prior conduct giving rise to RICO liability is governed by an agreement to arbitrate.

Indeed, after the district court vacated the Final Award, Kerr-McGee filed a "precautionary" complaint in the district court in order to state its RICO claim in that forum. Such a splintering of actions is contrary to the broad language used in the arbitration provision of the Charter, and would undermine the benefits the parties sought to achieve by agreeing to arbitrate "any and all" of their differences under it. We have held that a court must accord "the narrowest of readings" to the "excess of powers" provision of 9 U.S.C. § 10(d), which the district court relied on in vacating the Final Award. Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 703 (2d Cir. 1978). That was not done here.

Accordingly, we find that the arbitration panel acted within the scope of the Charter when it awarded Kerr-McGee treble damages under RICO for Triumph's conversion of the chartered cargo, and that the district court erred by not confirming the Final Award.

B. *The Partial Final Award*

Under the Arbitration Act, a party has one year to avail itself of summary proceedings for confirmation of an award. 9 U.S.C. § 9. An award that finally and conclusively disposes of a "separate independent claim" may be confirmed even if it does not dispose of all the claims that were submitted to arbitration. See Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir. 1986). Triumph contends that Kerr-McGee's motion to confirm the Partial Final Award is time-barred, because that award was a full and final disposition of the shortage claim and the motion was made more than one year after the date of the award. We question whether the one-year limitation should apply to a party seeking confirmation of an award that does not end the arbitration, since such a rule "will make arbitration more complicated, time consuming and expensive." Id. at 285 (Feinberg, J., dissenting). We need not resolve this issue, however, since we find that the Partial Final Award did not finally dispose of a separate independent claim, thus rendering the one-year limitation inapplicable in any event.

When it issued the Partial Final Award, the arbitration panel expressly left open whether, as a result of Triumph's breach, Kerr-McGee was also entitled to punitive or RICO damages, costs and attorneys' fees. It is thus apparent, as the district court found, that this award merely decided the issue of liability and partial damages on the shortage claim, which was a predicate act to the RICO claim, and did not finally dispose of an independent claim because it left open the question of damages. Cf. Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414 (2d Cir. 1980).

For the above reasons, we reverse the district court's judgment insofar as it vacates the Final Award and affirm its judgment insofar as it confirms the Partial Final Award. The district court is directed to enter judgment confirming the Final Award in its entirety.

Opinion and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

84 Civ. 3299
(WCC)

KERR-MCGEE REFINING CORP.,

Plaintiff,

—against—

TRIUMPH TANKERS LTD.,

Defendants.

APPEARANCES:

NOURSE & BOWLES
Attorneys for Plaintiff
One Exchange Plaza
55 Broadway
New York, New York 10006

John P. Vayda, Esq.
Maria L. Alonso, Esq.
Of Counsel

BURLINGHAM UNDERWOOD
& LORD
Attorneys for Defendant
One Battery Park Plaza
New York, New York 10004

Joseph C. Smith, Esq.
R. Scott Ervin, Esq.
Of Counsel

CONNER, *D.J.*:

This action is presently before the Court on the motion of plaintiff Kerr-McGee Refining Corp. ("Kerr-McGee") to confirm the Partial Final and Final Arbitration Awards and the cross motion of defendant Triumph Tankers, Ltd. ("Triumph") to vacate such awards. Triumph moves to vacate the partial award as time-barred and the final award on the grounds that the arbitration panel (1) exceeded their powers, (2) are guilty of misbehavior prejudicial to Triumph and (3) acted in manifest disregard of the law. For the following reasons, the partial award is confirmed and the final award is vacated.

FACTS

The present dispute arises out of a voyage charter party (the "Charter") dated March 5, 1984, between Kerr-McGee Refining Corp. ("Kerr-McGee"), as charterer and Triumph Tankers, Ltd. ("Triumph"), as owner of the vessel. On March 9, 1984, the vessel loaded 539,999 net bbls. of Beatrice Crude Oil at the Nigg Oil Terminal in Scotland and on March 10, 1984, sailed for Corpus Christi, Texas, arriving on March 28, 1984. Upon arrival at Corpus Christi, Kerr-McGee found that the amount of cargo on board was only 538,250.09 net bbls. Following discharge of the oil, Kerr-McGee discovered that a total of only 528,060.65 net bbls. had been received from the vessel. On the basis of these measurements, Kerr-McGee alleged short delivery and withheld freight in the amount of $213,000.

Because the Charter provided for arbitration of disputes "arising out of" the Charter, Triumph sought arbitration to recover the balance of freight withheld by Kerr-McGee. Kerr-McGee subsequently paid the balance but counterclaimed in the arbitration for $150,638.59 as damages for short delivery of 4,835.91 net bbls. of cargo. Thereafter, Kerr-McGee increased the amount of its shortage claim to 11,938.35 net bbls. of cargo and sought treble damages based on the Rack-

eteer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962-1968.

On September 7, 1988, the arbitration panel issued a Partial Final Award unanimously finding in favor of Kerr-McGee for the value of 7,497.41 net barrels of cargo short delivered, together with interest to the date of the Partial Final Award at 9% per annum, in the combined amount of $332,138.41 with interest to continue at 10% per annum until payment or judgment. The arbitrators deferred Kerr-McGee's RICO claim for which both parties submitted further briefs. On March 28, 1990, the panel issued its Decision and Final Award whereby the majority concluded that Triumph had converted 7,497.41 net bbls. of Kerr-McGee's cargo through a pattern of racketeering and awarded treble damages under RICO, costs, attorneys' fees and interest totaling $512,520.10.

In 1984, prior to the arbitration, Kerr-McGee commenced this action seeking to attach assets of Triumph located in New York as security for its claim. By agreement of the parties, this action was discontinued pending arbitration, upon the posting of security by Triumph's protection and indemnity underwriter. By order dated September 13, 1985, the Court dismissed this action subject to reopening for the purpose of confirming or vacating the arbitration award. The Court now considers the cross motions to confirm and to vacate.

DISCUSSION

I. Partial Final Award

Triumph first asks this Court to vacate the Partial Final Award of September 7, 1988 because Kerr-McGee's motion for confirmation is time-barred. Triumph claims that the partial award is a full and final disposition of the shortage claim, subject to confirmation within one year from the date issued, September 7, 1989. Kerr-McGee claims to the contrary, that the partial award did not fully and separately dis-

pose of an independent claim and therefore was not subject to confirmation until the date of the final award, allowing confirmation at the present time.

The Federal Arbitration Act ("Act") provides that if a party wishes to avail itself of summary proceedings for confirmation of an award,

> at any time within one year after the award is made, any party to the arbitration may apply to the court for an order confirming the award . . .

9 U.S.C. § 9. This provision limits the time in which a party may move for confirmation to one year after the date of the award. The law is well settled that an interim award which finally and conclusively disposes of a separate independent claim may be confirmed although it does not resolve all the claims that were submitted to arbitration. *Metallgesellschaft A.G. v. M/V Captain Constante*, 790 F.2d 280, 283 (2d Cir. 1986); *Eurolines Shipping Co. v. Metal Transport Corp.*, 491 F. Supp. 590, 592 (S.D.N.Y. 1980). If, however, the award left open the amount of damages or did not fully dispose of a distinct claim, the limitations period is tolled until the final award. *See Metallgesellschaft A.G. v. M/V Captain Constante*, 790 F.2d 280, 283 (2d Cir. 1986); *Michaels v. Mariforum Shipping. S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) ([interim award] "did not finally dispose of any of the claims submitted, since it left open the question of damages on the four counterclaims of Owner that it sustained and reserved decision on the fifth"); *Puerto Rico Maritime Etc. v. Star Lines*, 454 F. Supp. 368, 372 (S.D.N.Y. 1978) (declaration of liability leaving the question of the amount owing unanswered and the possibility of further disputes between the parties not separable and non-dependent). The question thus before the Court in determining whether the one-year period has run is whether the Partial Final Award finally and definitely disposed of a separate and independent claim.

In the Partial Final Award, the panel determined that Triumph breached the charter and was liable for shortage damages. Specifically, the panel found that Triumph "failed to deliver 7,497.41 net bbls. of Beatrice Crude, which resulted in

a loss to Charterers of $233,544.32." The panel further awarded interest to Kerr-McGee, allocated the arbitrators' fees and set interest at 10% to run until payment was made or the award was reduced to judgment. Kerr-McGee argues that because the panel left open whether, as a result of Triumph's breach, Kerr-McGee was also entitled to costs, attorneys' fees and punitive and/or RICO damages and whether Triumph was entitled to interest for late payment of freight, the Partial Final Award did not finally dispose of an independent claim, but merely decided the issue of liability and partial damages on the predicate shortage claim. This Court agrees.

Kerr-McGee likens its case to that of *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411 (2d Cir. 1980), in that while the panel established a value for the damages Kerr McGee was entitled to for its short-delivered cargo, it did not determine all of Kerr-McGee's damages arising out of its single shortage claim. Because all damages stem from the shortage claim, determination of Triumph's liability and the value of the short cargo alone does not completely dispose of an independent claim. Tied to that claim are the costs, attorneys' fees and punitive and/or RICO damages which are determined in relation to the substantive claim of conversion or theft.

II. Final Award

Section 9 of the Act provides that when an application for an order confirming an arbitration award is made to a district court, the court "must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. Section 10 provides, in relevant part, that an award may be vacated where the arbitrators "exceeded their powers." 9 U.S.C. § 10(d). Triumph challenges the panel majority's award of treble damages under RICO[1] as exceeding their powers, claiming

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1 18 U.S.C. 1964(c) provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate

that (1) the scope of the arbitration agreement did not empower the panel to consider a RICO claim, and 2) the panel considered evidence that had no relation to this voyage and thus did not "arise out of" the charter party.

Although the charter party between Kerr-McGee and Triumph does not specifically include RICO as a remedy for breach, it provides that:

> Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration . . .

While the award of civil RICO damages indeed exceeds the compensatory measure of damages typical in breach of contract claims, the composite claim before the panel no longer concerned only breach of contract but included a RICO element on which treble damages are expressly authorized. Therefore, Triumph's contention that the panel was not empowered to award the equivalent of punitive damages in a breach of contract claim is inapt. The panel, empowered by the arbitration agreement to consider "any and all differences and disputes of whatsoever nature," properly considered the RICO claim. *Shearson/American Express, Inc. v. McMahon*, 107 S.Ct. 2332, 2335 (1987) (RICO claim arbitrable under the terms of the Arbitration Act where parties contracted to arbitrate "any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof.") Accordingly, it can not be stated that the panel necessarily exceeded its power in considering the RICO claim and awarding treble damages.

Triumph further contends that the panel majority exceeded its power when it considered Kerr-McGee's allegations that Triumph was part of a group of shipowners engaged in a "pattern" of cargo conversion over a period of several years. Triumph argues that such consideration ignores the parties' agreement to arbitrate only those claims "arising out of this

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United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Charter," a charter which governed only the single voyage from Nigg Terminal to Corpus Christi.

In its Final Award, two of three arbitrators determined that the theft of cargo aboard the Triumph was part of a pattern sufficient to satisfy the requisites of civil liability under 18 U.S.C. §§ 1962(a) and (c) of RICO, including the "pattern" and "enterprise" requirements. In doing so, the panel majority expressly concluded that the owners of TRISUM, TRILIGNT, TRISTAR and TRIAD were converting cargo in a similar manner and that because Triumph not only was part of the same group but shared the same managing agent as these vessels, Triumph should be held accountable for their actions. The Court agrees with Triumph that because the parties agreed to arbitrate only those claims "arising out of" the Charter, the panel majority exceeded its power in looking to occurrences on other voyages in finding a pattern and enterprise to satisfy the elements of RICO and was accordingly without authority to award RICO damages on that basis.[2]

CONCLUSION

For the above stated reasons, Kerr-McGee's motion to confirm the partial award dated September 7, 1988 in the principal amount of $233,544.32 plus $98,594.09 interest through the date of the award, plus interest on the principal amount at the rate of 10% per annum until payment has been made in full is granted and Triumph's motion to vacate the final award is granted.

SO ORDERED.

United States District Judge

Dated: July 10, 1990
New York, New York

2 Because this Court finds that the panel exceeded its power, it is unnecessary to determine whether the panel was guilty of misbehavior prejudicial to Triumph or whether the panel acted in manifest disregard of the law.

Denial of Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NUMBERS 90-7778, 90-7800

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States courthouse, in the City of New York, on the 19th day of March, one thousand nine hundred and ninety-one

KERR-MCGEE REFINING CORPORATION
Plaintiff-Appellant
Cross-Appellee,

v.

M/T TRIUMPH, her engines, boilers and tackle, etc.
Defendant-Appellee,

TRIUMPH TANKERS, LTD.
Defendant-Appellee,
Cross-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee Triumph Tankers, Ltd.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further ordered that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

Decision and Final Award

In the Matter of the Arbitration

between

Triumph Tankers Ltd., as Owners of the TRIUMPH,

—and—

Kerr-McGee Refining Corp., as Charterers.

Before : Alexis Nichols
Louis P. Sheinbaum, Esq.
Manfred W. Arnold, Chairman

Appearances: Burlingham Underwood & Lord
for and on behalf of Triumph Tankers Ltd.
by Joseph C. Smith, Esq., of Counsel

Nourse & Bowles
for and on behalf of Kerr-McGee
Refining Corp.
by John P. Vayda, Esq., of Counsel

On September 7, 1988, the panel issued its Partial Final Award[1] in Charterers' favor for the value of cargo short delivered, together with interest.

At the time, the panel did not render a decision on the following claims or issues:

a) whether or not Owners were privy to the modification as a pre-existing condition when (or after) they acquired the vessel, or whether Owners in fact arranged for those structural changes.[2]

b) Charterers' claim for treble damages for Owners converting or taking Charterers' cargo under the Racketeer Influ-

1 SMA Award 2508 (1988).

2 Page 5 of the award.

enced and Corrupt Organizations Act (RICO), 18 U.S.C. Secs. 1961-1968.

c) Charterers' alternative claim for punitive damages.

d) Charterers' claim for attorneys' fees, the expenses of the arbitration and expert fees, which Charterers claim as costs.

e) Owners' claim for interest on the late payment of freight.

Having carefully reviewed and considered all submissions and arguments by the parties, the panel reaches the following decisions:

a) The panel accepted the presence of the modifications within the vessel's No. 3 centertank as a condition existent at the time of the subject March 1984 voyage of the TRIUMPH. The information, supported by a survey narrative and numerous detailed photographs, was obtained from a report dated March 27, 1986, prepared by McLaren, Dick & Co. (Asia) Ltd. for the account of Clyde & Co. in connection with an investigation of an alleged cargo shortage of about 13,000 barrels of light Nigerian crude on a voyage of the TRIUMPH in August/September 1983. There is no absolute proof as to the exact time when the modifications in the No. 3 centertank were made or who in fact made them. However, having accepted the fact that the conditions were existent in March 1984, it follows that the modifications existed when the Owners acquired the vessel or were made after the vessel had been purchased by these Owners. Thus, the questions the panel has considered include whether Owners did know or should have known about the No. 3 centertank condition, and whether there was a taking or conversion of cargo by Owners on the subject voyage.

When the McLaren report was submitted into evidence by Charterers to show, through the photographs and the narrative, that conditions existed on board the vessel which could have or in fact were used to effect the diversion of cargo, the burden of coming forward shifted to Owners. Owners then

produced the vessel's Chief Mate and Chief Engineer. Neither one confirmed nor recalled the existing conditions. Indeed, the Chief Mate denied the existence of the conditions which the panel has found existed on the vessel in the No. 3 centertank. The panel majority did not perceive the testimony of either the Chief Mate or the Chief Engineer to be unequivocal, forthright or trustworthy. Owners also submitted the affidavits of a surveyor as well as those by various crewmen commenting on the non-existence of the tank modifications and additional piping in the No. 3 tank. The gravity and significance of the McLaren report should have prompted a more persuasive rebuttal than that presented by the Owners, if one were available. The rebuttal presented was unconvincing.[3]

There is no direct evidence that the Owners constructed or knew about the modifications in tank No. 3. The Owners, however, controlled the vessel for an extensive period of time. As is implicit in the panel majority's findings[4] on conversion, the panel majority finds that Owners knew about the existing conditions in the No. 3 centertank.

Having reached this conclusion, Owners must assume the responsibility for the existence of the tank modifications and the consequences resulting therefrom and their actions.

b) Although the charter party between Owners and Charterers does not specifically include RICO as a remedy for breaches, the charter party provides:

> "Any and all differences and disputes of whatsoever nature arising out of this charter shall be put to arbitration . . . ."

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3 The surveyor of McLaren & Co. (Asia) Ltd. was not presented to testify by either party to the arbitration. Neither side requested that the panel do anything to have him appear or testify. After the issuance of the partial Final Award herein, while the RICO issue was in the deliberation stage, the dissenting member of the panel requested that the hearings be reopened on the panel's own initiative to demand and summon the surveyor to appear and testify. The other members of the panel did not agree.

4 Infra.

RICO was enacted in 1970. While originally devised to deal with the illegal activities of organized crime, it is clear from the statute itself that it has a civil side (Sec. 1964 is entitled "Civil Remedies").[5] In 1985, the Supreme Court stated in *Sedima, S.P.R.L. v. Imrex Co.*:[6]

> "In sum, we can find no support in the statute's [RICO] history, its language, or considerations of policy for a requirement that a private treble damages action under Sec. 1964(c) can proceed only against a defendant who has already been criminally convicted." (p. 493)

When dealing with this issue, it must be kept in mind that a claim under the RICO statute is directly and inseparably tied to the arbitration proceeding under which the original claim is pursued. If a matter has been submitted to arbitration, the moving/claiming party cannot pursue RICO in the courts if the other party objects to the claimant bringing suit.[7] Thus, if an arbitration panel did not hear a RICO claim, its failure to do so could deprive a claimant from having any forum with jurisdiction to determine the claim, could deprive a claimant of the contractual right to arbitrate its dispute against the allegedly liable party and could result in the undesirable circumstance of a party presumably having rights but no remedy.

Section 1962, "Prohibited Activities," consists of four subsections, with sub-section (a) dealing with the situation where the racketeering enterprise itself benefits from its own racke-

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5 18 U.S.C. 1964 (c) provides:

"(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

6 473 U.S. 479 (1985).

7 See *Shearson/American Express v. McMahon*, 479 U.S. 812 (1987).

teering activity.[8] In *Harco Inc. v. American National Bank and Trust Co.*,[9] the court stated:

> "Under sub-section (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity. This result is in accord with the primary purpose of RICO, which, after all is to reach those who ultimately profit from racketeering . . . ."[10]

Sub-section (b) refers to the acquisition of an interest in or control of the enterprise, and (c) covers the participation in the enterprise.[11]

The terms "enterprise," "person," "racketeering activity" and "pattern of racketeering activity" are defined in 18 U.S.C. par. 1961, in relevant part, as follows:

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8 18 U.S.C. 1962(a) provides:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

9 747 F. 2d 384 (7th Cir. 1984), aff'd 469 U.S. 1157 (1985). See also *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28 (1st Cir. 1986); *Kimmel v. Peterson*, 565 F. Supp. 476 (E.D.Pa. 1983).

10 At p. 402.

11 18 U.S.C. 1962(c) provides:

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

"(1) 'racketeering activity' means (B) any act which is indictable under any of the following provisions of [18 U.S.C.]: . . . section 659 (relating to theft from interstate shipment) . . .

* * *

"(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

"(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

"(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity

18 U.S.C. 659 provides in part:

"Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; . . . shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; . . . .

Before dealing with the applicability of RICO to this case, it would be in order to make a few general comments.

The parties have not questioned the panel's authority to deal with the RICO claim and issues, but the question lies with the appropriateness of applying it to the facts of this case. The award of RICO damages, in the context of the general law of damages, indeed does exceed the concept of mak-

ing the injured party whole, but this is a concept which ultimately is supposed to act as a deterrent.

Originally, the consideration and the awarding of RICO civil damages was meant to fight commercial fraud. Most recently, in its decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[12] the Supreme Court restated the pronouncements of *Sedima v. Imrex*, and upheld the broad use of the RICO statute, also restating that Congress had not meant to limit the statute to organized crime cases.

The panel has previously determined that the TRIUMPH failed to deliver 7,497.4 barrels of Beatrice Crude to the Consignee/Charterer, Kerr McGee Refining Corp. at Corpus Christi, Texas, and that the vessel contained a retaining area or tank within the No. 3 centertank which was created by welding and/or plating over apertures in the girders or internals of the No. 3 centertank. As set forth in the panel's earlier Partial Final Award, and as depicted and documented by the photographs and narrative of the McLaren report:

> "Associated with the starboard outer main bottom [cargo] line was a spur line of smaller diameter which for most of its length ran inboard and parallel to the main line on the outboard side of the starboard side girder in the forward "bay" of No. 3 centre tank. At the forward end the spur line was fitted with a (gate type), suction valve and short bend which was connected to a 'tee' piece in the main line adjacent to bulkhead No. 2/3. At the aft end the spur line turned inboard, and passed through the side girder into the starboard after corner of the 'enclosed area' where it dropped down and terminated in a suction strum."

During the course of this arbitration, the panel ordered that the original engine log book of the TRIUMPH be produced by owners. Examination of the document indicated that the entries in the log book, for about five days, for the amount of bunkers on board, starting at the next port at

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12 _____ U.S. _____, 109 S.Ct. 2893 (1989).

which bunkers were allegedly purchased (after departing from Corpus Christi), were whited-out (covered over), and new (substantially lower) entries/numbers were written over the white-outs. The engine log book entry for the amount of bunkers taken on board at this next bunkering port was also whited over, and changed to substantially reduce the amount of bunkers on board by about 550 tons.

When confronted with this, the Chief Engineer first testified that the numbers written over the white-out were the same as the ones under the white-out, or the white-out had been used to cover some smudges; but then testified that the white-out had been made in order to correct errors in the original numbers, or that he was uncertain why he had made the changes. The Chief Engineer and Chief Mate were obviously not credible witnesses, just as the engine log book bunker entries were obviously suspect.

A good deal of time passed between the presentation of the McLaren report to the panel and the testimony of the Chief Mate and Chief Engineer. No officer, management person or executive of the Owners, or the managing company of the vessel, testified before the panel. Nor was the panel presented with any affidavit from any such person or persons.

The panel was also presented with evidence to the effect that there were four other substantial shortages sustained by crude oil cargoes carried by the TRIUMPH during a two-year period, including the time of the voyage in question. In response, Owners submitted a list of voyages of the TRIUMPH purporting to indicate which voyages involved "disputed" cargo claims. The list shows four "disputed" claims. However, the accuracy of the list is suspect by reason of the fact that the very voyage of March 1984, which is the subject of this arbitration, was indicated as "no dispute".

In the arbitration between *Trisun Tankers. Ltd. v. Burmah Oil Tankers Ltd.*,[13] the vessel was found to have converted crude oil cargo on a voyage in June 1984, and the owner was found liable for the taking. The managing company of the TRISUN was also the managing company of the TRIUMPH.

13 SMA Award 2327 (1986).

Both vessels were owned by single ship corporations, but were in the same group.[14]

Finally, but certainly not last in importance in evaluating the probabilities, the proper inferences to be drawn from the facts, and the claim made herein under RICO, is the fact that the modifications made in the No. 3 centertank of the TRIUMPH were permanent; the purpose of the modifications was clearly to divert, convert or take cargo; and it would be grossly naive or foolish to the point of absurdity to suggest or believe (especially for the practical and real world of commercial/maritime arbitration) that the tank within a tank of the TRIUMPH was intended to be used, or was used, on only one occasion.

It was common ground between the parties that in order to prevail on its civil RICO claim, the charterer was obliged to prove same by a preponderance of the evidence; i.e., based upon the evidence presented, it was more likely than not that the facts requisite for the claim to succeed were as alleged by charterer.[15]

On the basis of all the evidence presented, and the reasonable, and even compelling, inferences to be drawn therefrom, it is concluded that Owners (Triumph Tankers Ltd.) converted the 7,497.4 barrels of Beatrice Crude to their own benefit or use in violation of 18 U.S.C. 659, and that Charterers

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14 In early October 1984, the TRILIGHT, a tanker managed by the same company managing the TRIUMPH, was inspected in Wilhelmshaven, Germany. The inspection was made in connection with the investigation of an alleged cargo shortage on the previous voyage. A pipeline was discovered leading from the ship's No. 1 center cargo tank, through a cofferdam and into a hidden tank within the vessel's forward fuel oil deep tank.

In November 1982, the TRIAD, another vessel managed by the managing company for the TRIUMPH, was inspected in Louisiana by representatives of U.S. Customs. Crude oil was found in a fuel oil settling tank, in lines where bunker fuel should have been, and in the bunker tanks.

Charterers also presented evidence to the effect that on May 17, 1984, an explosion occurred on board the TRISTAR (still another vessel managed by the company managing the TRIUMPH), as a result of which, a seaman was fatally injured, and that the after fuel tanks of the vessel had contained an explosive atmosphere.

15 *Liquid Air Corp. v. Rogers*, 834 F. 2d 1297 (7th Cir. 1987).

have satisfied their burden of showing that the taking of said cargo was part of a pattern sufficient to satisfy the requirements of civil liability under 18 U.S.C. 1962(a) and (c) of RICO, including the "pattern" and "enterprise" requirements.[16]

Accordingly, by reason of the egregious conduct present in this arbitration, it is appropriate to apply RICO against Triumph Tankers Ltd., together with its treble damage provision (18 U.S.C. 1964 (c)), and Charterers are hereby awarded additional damages against Owners of $368,495.55, calculated by multiplying by three the value of the 7,497.4 barrels of Beatrice Crude (3 × $233,544.32 = $700,632.96), and subtracting therefrom the $322,138.41 (cargo value and interest) awarded to Charterers under the Partial Final Award dated September 7, 1988.[17]

c) Given the above findings and award relative to RICO, Charterers' claim for punitive damages is moot.

d) Clause 24 of the charter party permits the awarding of "costs, including a reasonable allowance for attorneys fees".

Owners have argued that Charterers wasted time and incurred expenses by "attempting to create a case of bad faith, conversion and racketeering where no such activity took place". 18 U.S.C. 1964(c) of RICO provides that the injured party "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee". It is the majority's opinion that the events and circumstances surrounding this voyage justify an award of attorneys' fees and costs, as well as the reallocation of the arbitrators' fees. Had it not been for the proven shortage in the delivery of cargo and the modifications in the No. 3 tank, this arbitration might never have arisen. Having brought this

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16 *Beauford v. Helmsley*, 865 F. 2d 1386 (2d Cir. 1989) vacated for further consideration, _____ U.S. _____, 109 S.Ct. 3236 (1989); upheld by order of Second Circuit September 15, 1989; see also *U.S. v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989).

17 *Louisiana Power & Light v. United Gas Pipe Line*, 642 F. Supp. 781, 811 (E.D. La. 1986).

matter upon themselves, Owners should not now argue that Charterers should bear the responsibility for the time and moneys expended in this case.

The panel majority, therefore, rules that Charterers are entitled to an award of $111,544.55 for legal fees and the disbursements of counsel for Charterers. We also award to Charterers the amount of $15,600 representing the share of the arbitrators' fees previously assessed against and paid by Charterers, but now reallocated against Owners.

The panel majority also allows the expert fees claimed in the sum of $16,880.

The panel is authorized to award the recovery of the above legal fees, disbursements and expert fees, as "costs" and "the cost of the suit" under the charter party and 18 U.S.C. 1964(c).

e) Early in the arbitration, Owners claimed they were entitled to recover interest on that portion of freight which had been withheld by Charterers. Pursuant to the charter party, freight was due upon delivery which was completed on March 30, 1984.

Charterers initially withheld freight of $213,000, an amount less than the value of the cargo taken by Triumph Tankers Ltd. Charterers subsequently paid $92,268.49 of the $213,000 on April 10, 1984. On May 11, 1984, Charterers paid an additional amount of $120,731.51. The amount of interest claimed is calculated to be $1,935.76.

Interest is normally due and awarded to owners on freight which is withheld or paid late by charterers. However, under the circumstances of this case, involving the intentional taking and conversion of cargo by an owner, it would be improper to award any interest on the withheld freight. The denial of interest in this matter is in accord with the treatment of the claim of the owners for interest in the TRISUN.[18]

As part of this Final Award, the panel majority has decided that the arbitrators' fees, as per Appendix are

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18 SMA Award 2327 (1986).

assessed in full against Owners. Payment of the fees, however, in the first instance is to be made in full by Charterers. The liability for the panel's fee is the joint and several obligation of both Owners and Charterers.

THE AWARD:

Owners are directed to pay to Charterers the additional sum of $512,520.10, arrived at as follows:

1. Damages	$368,495.55
2. Legal fees and disbursements	111,544.55
3. Arbitrators' fees previously paid by Charterers	15,600.00
4. Expert fees	16,880.00
	$512.520.10

If this award has not been satisfied in full within 30 days from the date of this award, interest at the rate of 10% per annum shall become due on the amount of $512,520.10 from the date of this award until payment in full has been made or the award has been reduced to judgment, whichever first occurs.

Alexis Nichols (dissenting)

Louis P. Sheinbaum

Manfred W. Arnold, Chairman

New York, New York
March 28, 1990

APPENDIX A

DISSENTING OPINION ON THE "TRIUMPH" AWARD

by: Alexis Nichols

Four of the highest jurists of the land, Supreme Court Justices Marshall, Brennan, Blackmun and Powell, in dissenting from the *Sedima* narrow majority which was cited by my colleagues, used unusually strong language in their indictment of the abuses of the civil provisions of the Rico Statute;

> "Many a prudent defendants facing ruinous exposures will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat."

Hon. Frederick C. Roucher, a U.S. Congressman, member of the House Judiciary Committee had this to say about Rico:

> "There is a new form of extortion sweeping the country. Business people of all types and professionals such as accountants-bankers, insurance agents and securities brokers are among its primary victims. They are being threatened with a weapon that can inflict huge damages and bring unjustified shame and ruin upon them. This method of extortion can be made more effective than brass knuckles, fire or vandalism. Ironically, Congress inadvertently created it as part of a bill designed to help legitimate businesses defend themselves against organized crime. Instead, it has been turned against the very people Congress intended to aid. This weapon is the civil component of the Racketeer Influenced and Corrupt Organization Act (RICO)."

New York Law School, Law Review 131 N.Y.L. Sch. L. Rev. 133 (1986) *"Closing the Rico floodgates in the aftermath of Sedima"*.

Cries of legal outrage about the Rico Statute were also heard from the U.S. Courts of Appeal for the Seventh, Fifth and Second Circuits, the latter having federal jurisdiction over New York where the Triumph arbitration was conducted.

> ". . . The Seventh Circuit recently sent out what it called a 'distress flag' asking Congress to reform civil Rico . . . and the Second Circuit has opined that [g]iven the general purpose of the Rico legislation, the uses to which private Rico has been extraordinary, if not outrageous."[19]

As if the outrage of the U.S. Courts was not enough, there is a flood of proposed legislation intended to block its misuse and reform the Rico statute. One out of the nine pending bills is H.R. 5290 (99th Congress 2nd Session), introduced by U.S. Senator Peter W. Rodino, Jr., Chairman of the House Judiciary Committee.

The Statute's civil provisions are so vague and expansive that they make almost any claim for damages a potential Federal RICO case. "Virtually everyone who has addressed this question", said Chief Justice William Rehnquist in April 1989, "agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with organized crime. They are garden variety fraud cases of the type traditionally litigated in the State Courts."

With so many prominent legislators, judges and legal scholars, strongly criticizing the abuse of RICO's misguided civil provisions and the pending legislation which may, any day now, overturn the treble damage remedy of this Statute, I find the majority's rush to apply, for the first time ever, the statute's treble damage relief in maritime arbitration, an exercise in arbitral arrogance.

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19 Lacauora & Aronow, *The legal shakedown of legitimate business people: The Runaway Provisions of Private Civil Rico*, 21 New Eng. L. Rev. 1 (1985-86).

The fallout from today's decision is not difficult to predict. Although one arbitration does not establish a precedent, aggressive maritime attorneys, who ordinarily handle run of the mill commercial maritime disputes, will henceforth be tempted to also plead treble damages, under the civil RICO statute, having nothing to lose and everything to gain in so doing. The informality of maritime arbitration, lack of judicial restraints and the inherent freedom, from such annoying technicalities as burden of proof and rules of evidence, will transform every single, isolated and sporadic act of fraud, into a pleading of an act of racketeering activity with dire consequences.

The *Triumph* is a typical case of a greedy plaintiff who was not satisfied with the compensatory damages of $332,138.41 which the Panel awarded it in its Partial Final Award. It now wants to line its pocket by collecting another $1,115,638.80. Counsel for charterers implied that his client seeks treble damages out of some noble calling to improve the moral standards of society, as if it is society's self-appointed protector.

The Award of punitive damages, it has been said, makes it too costly for others to commit similar acts of fraud. The fact that it is not society, but the Charterers, who would enrich themselves by one million dollars, is skillfully left out from their otherwise altruistic motives.

The McLaren Report:

On March 12, 1986 an unidentified employee of McLaren, Dick & Co. (Asia) Lytd., of Hong Kong, pursuant to instructions received from London attorneys, visited the vessel at a demolition yard in China. Neither the name of the employee, nor his educational background, training or business experience were ever disclosed to the arbitrators. In fact, the employee was never produced to testify and owners were never invited to attend the inspection in China. Given the publicity charterers gave the McLaren Report, their subsequent silence about the disposition of the London proceed-

ings and the impact the Report had on same is deafening. So much for charterers' "smoking gun" theory.

After an exhaustive search in No. 3 tank, which was partially cut-up, the first McLaren Report concluded that; ". . . it will be appreciated that *nothing* of note concerning *pilferage* of cargo was *discovered* in the course of our inspection."

On June 18, 1985 the solicitors instructed the same inspector to go back and re-inspect the vessel. Again owners were not invited to attend.

The second inspection revealed certain weldings in No. 3 Tank as described in the majority's decision. The Report concluded that; ". . . based on what we found . . . we conclude that it would have been possible to divert oil cargo for the ship's own use . . .". The Report would have been less partisan and consequently much more credible, if only its author had also stated what everybody in this business knows to be true; that every tanker afloat, by design, has the facility to "divert" oil to any one of its many compartments, without same constituting an indictment of cargo theft.

Even if one accepts that cargo was retained on board, whether deliberately or negligently, charterers' witnesses were unable to explain how a small 500 cubic meter container described in the McLaren Report, could hide 12,000 barrels of the allegedly missing oil. Uniquely large though the quantity of the missing oil was, none of it was located and no single explanation was suggested to account for the whole loss.

The main thrust of the majority's decision is its totally unsubstantiated conclusion that Triumph Tankers Ltd., "knew about the existing conditions in No. 3 Center Tank" and "owners must assume the responsibility for the existence of the tank modifications and the consequences resulting therefrom and their actions", despite the fact that, in March 1986, the McLaren inspector, himself, could not find the so-called "modifications", having spent a full day looking specifically for same, upon receipt of solicitors' instructions to that effect.

The "Triumph" changed hands several times during the period 1969-1985. She was launched as the "Credo" in 1969 and in 1976 she changed ownership and name to "Getafix".

In 1982 she was purchased by Triumph Tankers Ltd., and sold for scrap in 1985. The McLaren Report sets no date as to when the weldings in No. 3 Tank were made and charterers made no effort whatsoever to procure evidence suggesting their age, which would have been easily determined by a metallurgical test.

Charterers submitted the McLaren Report without the corroborating testimony of the person who authored it and offered no foundation whatsoever to qualify him as an expert witness. Given the fact that the suspicious No. 3 Center Tank was a dirty ballast tank which, minutes before loading commenced, contained some 22,000 tons of sea water, common sense dictates that both the arbitrators and Triumph Tankers Ltd. should have been given the opportunity to cross-examine the mystery man who conducted the two inspections in China. My request to the Panel that he be produced for cross-examination was denied.

The Partial Final Award correctly states that the modification to the No. 3 Center Tank rendered the vessel's measurements unreliable. Consequently, in order to calculate the intransit loss, one had no alternative but to use the shore tank measurements both at the loading and discharging port. The Partial Final Award, howevever, did not "make a determination as to whether or not owners were privy to the modifications . . . or whether owners in fact arranged for these structural changes.

This was left to be decided in the Final Award, such inquiry forming the corner-stone of plaintiffs' cargo theft claim. It is in this context, therefore, that I requested that this crucial, albeit unnamed witness be produced.

The majority mistakenly alleged that I requested that the hearings be reopened, something which the S.M.A. arbitrators have the power to so order. For purposes of the Final Award, however, no hearings whatsoever were held with respect to the determination of the cargo theft and Rico claims.

In *Colorifico Italiano Max Meter S.p.A. -vs- S/S "Hellenic Wave"*, 1419 F.2d 223 (5 Cir. 1969), the Court of Appeals said:

> "The rule is well established that survey reports and similar documents—offered without supporting testimony, are not admissible in evidence. *The VIVID*, Fed. Cas. No. 16. 978, 4 Ben.319, 14 Int. Rev. Rec. 163 [E.D.N.Y. 1970]; *Watson -vs- Insurance Co. of North America*, Fed. Cas. No. 17 284, 2 Wash. c.c. 152 (1980); *The Director*, 34 F. 57 (1988). 'The proper proof of the facts ascertained on the surveys . . . is the testimony of the surveyors' 34 F at 60."
>
> "The right to cross-examination has been described as the greatest engine ever invented for the discovery of truth" 5 Wigmore on Evidence § 1367, p. 29. These crucial rights cannot be denied upon the mere ground that the rules of evidence are very liberal in admiralty matters."

Charterers introducted the McLaren Report as the "smoking gun" in support of their treble damage claim. Charterers have failed to meet their burden of proof that Triumph Tankers Ltd., had anything to do with the weldings in No. 3 Tank.

RICO:

The majority correctly cites *Sedima*, 473 U.S. 479 (1985), in support of the statute's unrestricted application against defendants who have not necessarily been criminally convicted before.

The majority, however, is totally off the mark in citing *Liquid Air Corp. -vs- Rogers*, 1834 F. 2d 1297 (7th Cir. 1987), in support of its finding that the facts required for the Rico claim in *Triumph* to succeed "were as alleged by Charterers". The brevity of this one-sentence sweeping indictment compares most unfavorable with the expansive and detailed

legal analysis Rico complaints have received in the hands of learned jurists throughout the country.

A brief narrative of the background of *Liquid Air* will assist in placing the *Triumph* Rico claim in its proper perspective.

Liquid Air, a compressed gas manufacturer, leased several thousand cylinders containing compressed gas to D&R Welding Supply Corp. in which two of the shareholders were Jack Rogers and George Michlik. Through a series of fraudulent shipping orders, D&R Welding Supply Corporation misappropriated over 3,000 cylinders of compressed gas.

A jury found all the defendants guilty, namely, D&R Welding Supply Corporation, Jack Rodgers, George Michlik and Ray Bridges. Bridges was recruited to handle all the paperwork and under the scheme, Bridges falsified documents so that it would appear that D&R had returned all the leased cylinders. The scheme was accomplished through nineteen separate falsified shipping orders, over a period spanning 7 months. The jury assessed Rico damages against the defendants who filed an appeal to overturn the jury's verdict.

The following are excerpts from the *Liquid Air* decision of the Court of Appeals:

> "All subsections 1962(a)(b)(c)(d) require plaintiff to show that defendants engaged in a pattern of racketeering activity. A pattern of racketeering activity requires at least two acts of racketeering activity in ten years, 18 U.S.C. 1961(5)."
>
> "In *Sedima* the Court noted that a pattern of racketeering activity requires more than two acts committed within a ten year period; acts must have 'continuity plus relationship which combines to produce the pattern'."
>
> "Borrowing from another statute the *Sedima* U.S. Supreme Court defined Pattern as 'criminal acts that have the same or similar purpose, results, participants, victims or other methods of commission or othervise are related by distinguishing characteristics and are not isolated events.

Since *Sedima*, the various courts have wrestled with the definition of "pattern of racketeering activity" under Rico. In *Liquid Air* the Court opted for a middle course definition requiring:

> ". . . The predicate acts to be ongoing over an identifiable period of time so that they can fairly be viewed as constitututing separate transactions . . .
>
> "A single fraudulent scheme with one injury to one victim was not transmutted into a federal case simply because it required several acts of mail and wire fraud to inflict the single injury. Accord, *Marks -vs- Pannel Kerr Foster*, 811 F.2d 1108 (7th Cir. 1987).

In *Liquid Air* the Court concluded:

> "Therefore, we have a single scheme which lasted seven months and defrauded a single victim. The defendants committed nineteen separate acts, each act resulted in a distinct injury to Liquid Air and concommitment benefit to D&R (defendant). We find that the repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of Civil Rico. Accord, *Sun Savings & Loan Ass'n. -vs- Dierdorff*, 825 F.2d 187 (9th Cir. 1987)."

This is hardly the case in *Triumph* where the alleged predicate act, i.e., pilfering of cargo, merely constitutes a single, isolated injury to one single victim.

The majority also cites *Louisiana Power & Light -vs- United Gas Pipe Line*, 642 F. Supp. 781, 809 (E.D. La. 1986), in support of its finding that a pattern of racketeering activity existed in *Triumph*. However, the Court defined the term "pattern of racketeering activity" as follows:

> "Rico is meant to punish those who harm others in a continuous systematic way, not those who harm others only once by a series of actions. When a plaintiff is hurt by one fraud which is only furthered by several mailings

> rather than hurt by repeated acts of fraud, the Courts are reluctant to impose Rico damages . . ."
>
> "The exact meaning of the term 'multiple criminal episodes' is not clear, but at a minimum it means that the defendant must harm the plaintiff more than once—it must committed acts which are ongoing and which have an indendent and repeated harmful significance for the plaintiff."

The Charterers in *Triumph* did not allege, much less prove, that they were harmed by the vessel owner more than once.

Based on *Louisiana Power* the *Triumph* Rico claim has no standing.

In *Louisiana Power* the Court makes another significant point, which is fatal to plaintiffs' Rico claim in this arbitration. Said the Court;

> "Because the Rico statute does not specify a limitations period for civil actions. the applicable period is that of the most analogous limitations period set by state law *Johnson -vs- Railway Express Agency Inc.*, 421 U.S. 454- 462, 95 S. Ct. 1717; 1721, 44 L. Ed. 2d (1975). This court recently held that civil Rico claims are governed by the one year prescriptive period applicable to fraud actions in Louisiana. *Moore -vs- A.G. Edwards & Sons, Inc.*, 631 F. Supp. 138. 144 (E.D. La. 1986).

In the instant matter, charterers amended their claim to include a Rico claim in June 1987, whereas, the predicate act took place in February of 1984. In view of this, I respectfully submit, that based on the above case cited by the majority the Rico claim appears to be time-barred, on the basis of the one year prescriptive period applicable to fraud actions.

The majority finally cites *Beauford -vs- Helmsley*, 865 F.2d 1386 (2nd Cir 1989), in support of the proposition that charterers have "satisfied their burden of showing that the taking of said cargo was part of the pattern sufficient to satisfy the requirements of civil liability under 18 U.S.C. 1962 (a) and (c) of Rico including the Pattern and enterprise requirements.

The United States Court of Appeals, Second Circuit, reheard en banc *Beauford* and affirmed the dismissal of the civil Rico complaint which had alleged a pattern of racketeering activity in the sale of 8,286 apartments converted into condominiums. Said the Court:

> "We stated that our precedents were confusing but seemed to require the conclusion that 'a single alleged scheme to defraud buyers, tenants and the authorities overseeing the law pertaining to the conversion is not sufficient to allege Rico enterprise regardless of how many fraudulent acts it entails'. We concluded that the Beauford complaint was properly dismissed for lack of Rico enterprise."
>
> "What is required is that the complaint plead a basis from which it could be inferred that the acts of racketeering activity were neither isolated nor sporadic."

The Beaufort Court then discussed *Indelicato* who was convicted for three acts of murder.

Said the Court:

> "In *Indelicato* we found the threat of continuity inherent in the criminal nature of the enterprise at whose threat the three related murders were committed . . .
>
> "When, however, there is no indication that the enterprise . . . is associated with organized crime the nature of the enterprise does not of itself suggest that racketeering acts will continue, and proof of continuity or the threat of continuity of Racketeering activity must thus be found in some other factor other than the enterprise itself."

In the *Triumph* arbitration we are not dealing with murder. Triumph Tankers Ltd., were not linked to organized crime and the vessel itself was sold for scrap in 1985, some two years before the Rico claim was filed, therefore presenting no continuing threat.

Another Rico decision which supports the dismissal of this Rico claim is *Albany Insurance Company -vs- Esses*, 821 F.2d 41, 44 (2nd Cir 1987).

In *Albany*, on motion by the defendants, plaintiffs' Rico suit was dismissed by the District Court Eastern District of New York, and the dismissal was affirmed by the U.S. Court of Appeals for the Second Circuit.

The Court summarized the law regarding "continuity of the Rico enterprise" as follows:

> "In *Sedima* the Supreme Court indicated that proof of two acts of racketeering activity without more does not establish a pattern . . .
>
> ". . . To establish more there must be a threat of continuing activity . . . the Court emphasized that it is this factor of continuity plus relationship which combines to produce a pattern . . . continuity plus was required because Rico was not aimed at sporadic criminal or at the isolated offender . . .
>
> "With its straightforward and short-lived goal, the enterprise alleged by Albany is not sufficiently continuing to constitute a Rico enterprise under 18 U.S.C. 1961(4) 1962, *Beck*, 820 F.2d at 51. We therefore affirm the dismissal of the Rico claim. (All Citations Omitted)

Charterers in their Reply Brief dated January 31, 1989 (p. 20) defined *Triumph's* continuity of the Rico enterprise by stating that Oscar managed the TRI-vessels (T371) and that Chief Mate Votis and Chief Engineer Petropoulos, were the prime actors in the enterprise (meaning Oscar) and their movement throughout the fleet of other vessels managed by Oscar united them, owners (meaning Triumph Tankers Ltd.), the common manager Oscar of the TRI-fleet and the vessel "Triumph".

Neither Oscar nor Chief Mate Votis, or Chief Engineer Petropulos are Rico codefendants in the Triumph arbitration.

Neither Oscar nor its employees injured the plaintiff in this action or at any other time.

The vessels "Trisun", "Trilight" or "Triad" mentioned in the majority decision, are unrelated to Triumph Tankers Ltd., except for allegedly having a common managing company, which is not a co-defendant in this action. In shipping, managing companies operate vessels in a similar fashion as in real estate, where managing agents run a variety of other people's real estate Properties. Therefore, to hold a vessel owner liable, under Rico, for alleged predicate acts committed by the non-defendant managing agent, is as untenable as holding individual apartment-owners liable under Rico, for the acts of their real estate agents, solely on the grounds of "common management", a rather outrageous proposition.

The sole defendant in this arbitration is Triumph Tankers Ltd. In terms of the Rico statute, the "person" can only be the named defendant, i.e., Triumph Tankers Ltd., who it was never alleged to have been associated with organized crime (See Beaufort and Indelicato).

Triumph Tankers Ltd., cannot be found liable with respect to predicate acts allegedly committed by third parties unrelated to this defendant.

For purposes of sub-section 1962(c) the "person" sued must be separate from the "enterprise" that the "person" is alleged to have participated in or conducted. Therefore, for the purpose of 1962(c) Triumph Tankers Ltd. cannot be considered the enterprise. In fact, charterers in their January 31, 1989 Reply briefs identified Oscar as being the enterprise.

Plaintiff has listed several separate predicate acts committed by various entities other than Triumph Tankers Ltd., in support of an allegation of a pattern of racketeering activity.

The only predicate act involving Triumph Tankers Ltd., the voyage presently under discussion which, based on sound legal principles represents at best a single and isolated injury to one victim.

Since there is no evidence of continuity and "relationship plus" according to *Albany*, charterers' Rico claim fails. Even if, for argument's sake, charterers could prove a racketeering violation in all the other vessels listed, charterers still *cannot recover under Rico, because charterers must also show that they themselves were injured as a result thereof.*

This is not possible because the charterers (Kerr McGee) were not a party to and of the other voyages mentioned in the post-hearing briefs and the majority's decision.

Finally, under Section 1962(a) District Courts have held that plaintiffs suing under 1962(a) must show that the injury for which they seek Rico damages was caused by the use or investment of the ill-gotten funds rather than the racketeering activity itself. *Louisiana Power & Light*, 642 F. Supp. 805 (E.D. La. 1986). Plaintiff has failed to prove the element covering the investment of racketeering-driven income in the enterprise as was required by 1962(a).

The Rico Statute awesome as it may be, places a heavy burden upon plaintiff to satisfy all the elements pleaded. To do so, one should come forward with evidence not just theories. This plaintiff failed to meet its burden of proof.

The arbitrators received absolutely no independent evidence or testimony about the Rico statute and its application. What we did receive, were partisan post-hearing briefs by the parties, which, as expected, were conflicting and contradicted each other's positions.

By June 1989, at the conclusion of the last session of the arbitrators' lengthy deliberations, the two party appointed arbitrators had adopted opposite view points, with the Chairman still pondering the Rico issue.

On August 17, 1989, the Chairman wrote the arbitrators; ". . . I have come to the conclusion that this is a case which, on the face of it, meets the requirements to invoke Rico; there is also no doubt in my mind that we have the power to apply Rico; but I feel that despite the pre-existing conditions, I do not have to apply Rico . . .".

On November 1, 1989, without the arbitrators having met to deliberate again, the Chairman wrote; " . . . after agonizing hours and days of review and analysis I have now reached the conclusion that Rico damages should be awarded . . .". This sudden change of mind prompted the exchange of several letters amongst the arbitrators.

On November 28th, in a letter to the Panel Chairman, the other party-appointed arbitrator explained that he had called him, after he received his August 17th letter because; ". . .

it was not clear to me whether you were leaning one way or the other or had made up your mind on the Rico issue . . . that was the substance of the conversation which I believe was on August 23, 1989. It was a short conversation. We did not discuss the facts, the merits, the law, and I told you that I would send you my comments on your draft and my version of the Rico section . . .".

The only legal analysis on Rico received by the arbitrators, consisted of the two partisan, post-hearing briefs, prepared by opposing attorneys and the comments and version of the Rico section prepared by the other party-appointed arbitrator, who, by June 1989 and during the final deliberations, had openly adopted charterers' Rico pleadings (as much as the writer had endorsed the opposite viewpoint).

Understandably, the two opposing attorneys owe allegiance to their respective clients, therefore one cannot quarrel with the bias evident in their respective legal briefs. Similarly, arbitrators at the end of the deliberations are expected to have formulated their own conclusions based on the evidence.

Therefore, given the partisan nature of the legal analysis the Rico statute received, I requested the arbitrators to invite an independent legal expert on Rico to testify as a "friend of the Court" before the arbitrators and the parties. My request was summarily and unfairly rejected.

Although arbitrators have broad discretion to control their own proceedings, *Scherk -vs- Alberto-Culver*, 417 U.S. 506 (1974); *John Wiley & Sons -vs- Livingston*, 376 U.S. 543, 557 (1964), their discretion is limited by their duty to receive all "relevant" evidence.

I sincerely felt then and still feel now, that we would all have derived an immeasurable benefit listening to such an independent and disinterested witness whose legal analysis with respect to this complex federal statute is most relevant.

The compelling interest to get to the truth and reach a correct legal analysis of this complex statute, should have been balanced against the need to keep the process relatively quick and inexpensive. In this case, however, with the proceedings spanning almost 6 years, I respectfully submit, that one more

hearing would not have caused prejudice to either of the parties.

We, as arbitrators, have wide discretion to accept or exclude witnesses and hear the evidence we deem relevant. It has been said that parties who agree to arbitration must be content with the informalities of the system. However, this informality must still give way to the requirement of fundamental fairness afforded the parties, which fairness, I regret to say, we failed to safeguard in this particular matter.

Alexis Nichols

New York, New York
March 26, 1990

RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment of more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling business), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or

(D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possesion of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior set of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State of Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State of Federal law, where the usurious rate is at least twice the enforceable rates;

(7) "racketeering investigation" means any attorney or investigator so designated by the Attorney General and

charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by an racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order; judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

(2)

No. 90-1934

Supreme Court, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TRIUMPH TANKERS LTD.,

Petitioner,

vs.

KERR-McGEE REFINING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

JOHN P. VAYDA
NOURSE & BOWLES
Counsel of Record for Respondent
One Exchange Plaza
At 55 Broadway
New York, New York 10006
(212) 952-6200

Of Counsel:
MARIA L. ALONSO
PETER T. JENSEN

Dated: July 17, 1991

QUESTIONS PRESENTED

May a Court conduct a *de novo* review and deny confirmation of the arbitrators' RICO award when it was established that at least four racketeering acts occurred during the span of the contract?

May arbitrators, appointed under an agreement to arbitrate "[a]ny and all differences and disputes of whatsoever nature arising out of" the contract, consider evidence beyond the specific contract when deciding a RICO claim?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

Respondent, Kerr-McGee Refining Corp. ("Kerr-McGee")[1], respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated January 28, 1991.

---

[1] Pursuant to Supreme Court Rule 29.1, Kerr-McGee states that its corporate parent is Kerr-McGee Corporation and that it has no subsidiaries other than wholly-owned subsidiaries.

I. STATEMENT OF THE CASE

Respondent incorporates by reference the "Background" section of the Second Circuit's opinion in this case. Pet. App. 3a-5a. Respondent attaches hereto the Partial Final Award of the arbitrators dated September 7, 1988, together with Appendix A thereto, as well as Appendix B to the arbitrators' Final Award dated March 28, 1990, both of which petitioner omitted from the Appendix to the Petition for a Writ of Certiorari. Resp. App. A-1 - A-10.

The Petition for a Writ of Certiorari is premised on two factually inaccurate positions.

First, as emphasized in the opinion of the Second Circuit, the full text of the arbitration agreement provides:

> *Any and all differences and disputes of whatsoever nature* arising out of this Charter shall be put to arbitration ****

(Emphasis added as in the Second Circuit opinion)

Pet. App. 3a.

The arbitration agreement is therefore broader then petitioner's construction of "arising out of" suggests (at Petition, p.3).

Second, contrary to petitioner's argument that the arbitrators based their finding of a RICO pattern on a single racketeering act on the voyage in question, the arbitration panel established that petitioner Triumph Tankers Ltd. ("Triumph") committed at least four acts of racketeering predicates during the voyage in question (see Point IV. A below).

Under these circumstances, this Court should not review the Second Circuit's decision which confirmed the arbitrators' award.

II. REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the "special and important reasons" which justify the granting of a Writ of Certiorari (Sup.Ct.R. 10) are not present in this case.

The petitioner seeks to have the Court believe that damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 ("RICO"), were improperly awarded because:

(a) The arbitrators exceeded their powers since the "pattern" of racketeering activities was based on events which did not "arise out of" the charter party; and

(b) Even if the arbitrators did not exceed their powers, the arbitrators only found one 'racketeering act'—the conversion of cargo.

Petitioner's arguments are factually incorrect for the reasons set forth below and do not warrant consideration by this Court.

A. THE FACTS FOUND BY THE ARBITRATORS DO NOT PRESENT THE ISSUES RAISED BY PETITIONER AND INSTEAD SUPPORT THE EXISTENCE OF A "PATTERN" NECESSARY TO SATISFY RICO REQUIREMENTS

The arbitration panel did not indicate which of its findings were relied upon for the award of treble damages under RICO. However, petitioner's contention that there was just one "racketeering act" and that the arbitrators necessarily looked to other vessels or voyages to establish a RICO "pattern" ignores the arbitrators' following findings which support the existence of a "pattern" of racketeering activity within the single voyage which was the subject of the dispute. Only two predicate acts

need be established within a ten-year period. 18 U.S.C. §1961(5).

First, the panel found that the vessel in question, the M/T TRIUMPH (the "Vessel"), had permanent concealed modifications to its cargo tanks and cargo lines at the time of the voyage (Resp. App. A-5 - A-6) which were created by welding and/or plating over parts of the vessel. Pet. App. 26a. The panel found that the purpose of these modifications was to steal oil cargo. Pet. App. 27a. These modifications constitute a scheme to obtain oil by means of fraudulent pretenses and is in violation of 18 U.S.C. §2314. Second, the panel found that petitioner stole a total of 7,497.4 barrels of Kerr-McGee's oil cargo in two separate thefts in violation of 18 U.S.C. §659. Resp. App. A-5 - A-6. Third, the panel found that petitioner knowingly transported Kerr-McGee's stolen cargo in foreign commerce and that the stolen cargo had a value in excess of $5,000.00. Pet. App. 28a. This act is in violation of 18 U.S.C. §2314. Fourth, the panel found that the Vessel's officers possessed and concealed the theft of crude oil. This act was accomplished through concealed modifications to the Vessel's tanks and pipe lines, by regularly altering the Vessel's log books (Pet. App. 26a-27a) and by giving false sworn testimony (Pet. App. 21a-22a), all of which was in violation of 18 U.S.C. §2315.

The dissent to the arbitrators' Final Award makes many arguments why the award of RICO damages is improper. However, the dissent should be given no weight whatever as the dissenting arbitrator was personally interested in the outcome. The dissenting arbitrator is the president of Brokerage & Management Corp., the New York affiliate of the Trade & Transport Group of companies. *Uco Terminals, Inc. v. Apex Oil Co.*, 583 F.Supp. 1213, 1214-1215 (S.D.N.Y. 1984). Trade & Transport Inc. was the owner of the tanker **LAUBERHORN**. In a case similar to the one at Bar, Valero Refining Company, Inc. sought RICO damages against Trade

& Transport for alleged theft of Valero's oil cargo on board the **LAUBERHORN**. The Fifth Circuit ordered Trade & Transport and Valero to arbitrate those disputes in New York in 1987. *Valero Refining, Inc. v. M/T LAUBERHORN,* 813 F.2d 60 (5th Cir. 1987). The **LAUBERHORN** arbitration was nearing conclusion at the very time that the dissenting arbitrator and the Triumph majority were deliberating and writing the Triumph award. There can be little doubt that the Triumph dissent was designed to influence the outcome of the **LAUBERHORN** arbitration by making arguments to be accepted by that panel or the courts. The Triumph Decision and Final Award is dated March 28, 1990. Pet. App. 20a. The dissent is dated March 26, 1990. Pet. App. 32a. The **LAUBERHORN** arbitration award, dated August 23, 1990, shows that its panel was keenly aware of the Triumph matter as it cited the District Court's July 10, 1990 Opinion and Order vacating the RICO award in this case. *Trade & Transport, Inc. v. Valero Refining Company, Inc.*, Award No. 2699 at 42 (LEXIS, Admrty Library, Usawds file). However, the **LAUBERHORN** arbitrators rejected the Triumph dissent's arguments unanimously finding that:

> The master of the **LAUBERHORN** with the help of his fellow officers and certain crew members, at the behest of and with the encouragement of his employer, Trade, deliberately and repeatedly transferred cargo from the cargo tanks into the bunker tanks, with the intention of using such oil as fuel oil.

Trade & Transport at 23.

The **LAUBERHORN** arbitrators then found *Trade & Transport* liable for a violation of RICO.

Based on the facts set forth above, the arbitrators had abundant evidence before them with which to find each of the

RICO elements within the voyage performed under the charter in question and the dissent to the Decision and Final Award should be given no weight whatever.

B. THE SECOND CIRCUIT DECISION REVIEWING THE SCOPE OF ARBITRATORS' POWER IS A PROPER APPLICATION OF LEGITIMATE POLICY GOALS TO THE GOVERNING CONTRACT

1. THE ARBITRATION AGREEMENT IN QUESTION CREATES A BROAD AGREEMENT TO ARBITRATE

The Court should also not be misled by petitioner's arguments which seek an unduly restrictive interpretation of the phrase "arising out of." As emphasized by the Second Circuit, the full text of the opening clause of the arbitration agreement which defines the arbitrable issues provides:

> *Any and all differences and disputes of whatsoever nature* arising out of this Charter shall be put to arbitration ****
>
> (Emphasis added as in Second Circuit opinion).
>
> Pet. App. 3a.

The Second Circuit noted that even though the broad arbitration provision permits the panel to look at evidence beyond the voyage in question, the arbitrators' decision imposes liability only on the petitioner for claims arising out of the voyage subject to the charter:

> The dispute here was directly based on a shortage in the fuel oil delivered at the end of the single voyage covered by Charter. It is true that Kerr-McGee thereafter obtained evidence that the shortage was

> intentional and part of a prior practice. This evidence, however, did not alter the facts that the dispute arose "out of" the Charter and the damages were inflicted during **TRIUMPH's** performance under it. Even though the arbitration panel looked at other voyages, it did not determine the liability of a person not party to the contract, . . . The award here imposes liability only on Triumph, a party to the Agreement to arbitrate.

Pet. App. 6a.

2. IT IS WELL-ESTABLISHED LAW THAT ARBITRATORS MAY LOOK BEYOND THE SPECIFIC TRANSACTION GOVERNED BY THE ARBITRATION AGREEMENT

There is nothing new or radical in arbitrators looking beyond the specific transaction governed by the agreement to arbitrate. Arbitrators, for example, regularly look to evidence of industry custom and practice in connection with a dispute arising out of a single contract. Custom and practice clearly develop even before the existence of the disputed contract and do not directly involve the parties to the contract. As this Court stated in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, (1960) the:

> . . . arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.
>
> 363 U.S. at 581-582.

This reasoning is sound since implicit in the parties' choice of arbitration as a method of dispute resolution is their desire for a resolution which will reflect industry practices and standards.

Additionally, this Court has specifically recognized that the nature of some types of claims *requires* arbitrators to look at evidence beyond the immediate agreement to arbitrate. In *Prima Paint Corp. v. Flood & Conklin Mfg.. Co.*, 388 U.S. 395 (1967), for example, this Court held that arbitrators have the power to determine a claim of fraud in the inducement of the contract which contains the arbitration agreement.

Maritime arbitrators must necessarily look beyond the transaction governed by the agreement on the many occasions when they must decide the central issue under the Carriage of Goods by Sea Act, 46 U.S.C. §1300-1315 ("COGSA"), that is, whether due diligence has been exercised to make the vessel seaworthy *prior* to the commencement of a voyage (46 U.S.C. §1304). By definition, all evidence of due diligence arises prior to the contract that contains the arbitration provision. If arbitrators were unable to consider prior events, the maritime arbitration process would be severely undermined.

3. ARBITRATORS MUST HAVE POWER TO LOOK BEYOND THE SPECIFIC TRANSACTION GOVERNED BY THE ARBITRATION AGREEMENT TO HAVE EFFECTIVE ARBITRATION OF RICO CLAIMS

This Court has definitively held that RICO claims are arbitrable. *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 242 (1987). The RICO statute requires that two "racketeering acts" within ten years must be established. 18 U.S.C. §1961(5). The victim of those predicate acts, however, need not be the plaintiff who claims injury from the pattern of racketeering. *See, e.g., H.J., Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229 (1989). To forbid arbitrators from hearing evidence of predicate acts which were committed outside the time span of the contract and to forbid them from hearing evidence of predicate acts committed against others

who are not parties to the contract in arbitration would strip arbitrators of their power to hear many RICO disputes. The facilitation of arbitration which the Supreme Court hoped to achieve through its ruling in *McMahon, supra,* would be lost. In fact, the burdens on courts would increase as litigation would constantly be required to determine what cases (or indeed, what issues) were arbitrable. For these very reasons, respondent, in the instant case, filed a precautionary Second Amended Complaint to state RICO claims in the event that the District Court's Opinion and Order vacating the Decision and Final Award is affirmed.

In sum, arbitrators must be free to look to events prior to the transaction in question and there is nothing new or remarkable in such a practice. Imposition of the restrictive standard advocated by petitioner, however, would disembowel the arbitral process.

4. PETITIONER DEMANDS A RADICAL AND DISRUPTIVE DEPARTURE FROM THIS COURT'S WELL-ESTABLISHED POLICY REGARDING THE REVIEW OF ARBITRATION AWARDS

This Court has established a clear policy which favors contractually agreed upon arbitration and has recognized the concomitant necessity of assuring the finality of arbitration awards. Petitioner, however, asks this Court to hold that the district courts should review the merits of arbitrators' awards and vacate an award which fails to state specific reasons for its conclusion, even though those reasons are contained within the award.

Presently, an award of arbitrators "may be made without explanation of their reasons and without a complete record of their proceedings." *Wilko v. Swan,* 346 U.S. 427, 436

(1953), *rev'd on other grounds, Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). It is the arbitrators' construction of the contract that was bargained for, not the court's. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Accordingly, the Second Circuit has established that an arbitration award will not be vacated when the arbitrator explains a decision "in terms that offer even a barely colorable justification for the outcome reached." *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978). Not even petitioner has suggested that there is any conflict among the circuits on this rule.

If this Court were now to require courts to abandon the present well-established standard of review noted above, that decision would obviously be at odds with developed policy which favors the autonomy of the arbitration process. It would also require not only the Second Circuit, but courts across the United States which have followed the Supreme Court's guidelines, to articulate new standards governing the review of arbitration awards. Additionally, the district courts would be required to submerge themselves in the merits of disputes that parties have contracted to be heard by arbitrators. In sum, this Court should not, as petitioner demands, make a radical and disruptive departure from its well-established policy limiting the review of arbitration awards.

C. THE QUESTIONS PETITIONER RAISES DO NOT MERIT REVIEW

The Second Circuit opinion is well reasoned and is tailored to allow the arbitration of RICO claims in conformity with well-established policy which protects the autonomy of the arbitration process. Petitioner advocates a rule of law which would call into question established arbitration practices such as the consideration of industry practice and the narrow standard governing judicial review of arbitration awards. The

rule of law proposed by petitioner would make the arbitration of many RICO claims impossible and would cause an undesirable realignment of the arbitration versus litigation balance. Moreover, this is not the appropriate case for consideration of the issues raised as the arbitrators' awards demonstrate sufficient facts to justify their confirmation.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

JOHN P. VAYDA
Counsel of Record for Respondent
NOURSE & BOWLES
One Exchange Plaza
At 55 Broadway
New York, New York 10006
(212) 952-6200

MARIA L. ALONSO
PETER T. JENSEN
Of Counsel

APPENDIX

In the Matter of the Arbitration	:	
	:	
between	:	
	:	Partial Final
Triumph Tankers Ltd., as	:	
Owners of the TRIUMPH	:	
	:	
and	:	
	:	
Kerr McGee Refining Corp.,	:	
as Charterers	:	

Before: Alexis Nichols
Louis P. Sheinbaum, Esq.
Manfred W. Arnold, Chairman

Appearances: Burlingham Underwood & Lord
for and on behalf of Triumph Tankers Ltd.
by Joseph C. Smith, Esq., of Counsel

Nourse & Bowles
for and on behalf of Kerr McGee
Refining Corp.
by John P. Vayda, Esq., of Counsel

This dispute arises out of a voyage charter party (ASBA-TANKVOY Form) dated March 5, 1984 between Triumph Tankers Ltd. (hereinafter "Owners") and Kerr McGee Refining Corp. (hereinafter "Charterers"), under which the parties agreed to arbitrate "(a)ny and all differences and disputes of whatsoever nature arising out of this charter . . . ".

The printed ASBATANKVOY Form, Part II, provided:

Clause 10 - PUMPING IN AND OUT.

The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections where delivery of the cargo shall be taken by the Charterer or its consignee. . . .

The contract covered a voyage from one safe port East Coast United Kingdom to port(s) in the U.S. Atlantic or Gulf of Mexico range on the basis of a part cargo of minimum 70,000 tons.

The vessel loaded at the Nigg Oil Terminal 539,999 net bbls. of Beatrice Crude with an API of 39.2. The quantity was determined by shore flow meters and same was incorporated in the Bill of Lading dated March 10, 1984 which showed Kerr McGee Refining Corporation as the consignee at Corpus Christi. Free water in the cargo tanks, after loading, was 1,947 bbls., for which Kerr McGee protested to shippers (Britoil) in writing. Ship's figures at the Nigg Terminal, as reflected by the Chief Officer's calculations, using vessel's records, show a cargo loaded of 545,033 net bbls. Vessel's bunker tanks were sounded by Charterers' surveyors and showed 1,281.871 L/T fuel upon arrival at the Nigg Terminal and 1,267.871 L/T at the time of sailing.

Upon arrival at Corpus Christi, ullages were taken by E. W. Saybolt (appointed by Charterers) and attended to by Hull & Cargo Surveyors, Inc. (retained by Owners). Saybolt calculated the cargo on board to be 538,250.09 gross bbls.

Pursuant to Saybolt's report (before "corrected"), the shore tank gauging showed a receipt of 528,060.65 net bbls.[1] and 3,198 bbls. of free water.[2] Again, Charterers' surveyors conducted a bunker survey which established 393.1 L/T fuel upon arrival and 359.38 L/T upon completion of discharge.

With respect to the claims, it appears that initially Charterers deducted $213,000 from freight to cover an alleged short delivery of cargo. On or about May 11, 1984, Charterers paid the withheld freight, with Owners now claiming for interest on the delayed payment.

Charterers' original claim was for the short delivery of 4,835.91 bbls., which equated to $150,638.59.[3] Subsequently, Charterers developed information,[4] according to which vessel's No. 3 centertank and its internals contained certain modifications (by welding and/or plating over apertures) which in fact created a retaining area or tank within this particular tank. The report refers at page 9 to,

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[1] Charterers' Exhibit 6, p. 3

[2] Charterers' Exhibit 6, p. 4

[3] The 4,835.91-barrel amount was calculated by taking the barrels on board based upon ship's tanks ullages on loading, according to surveyors appointed by owners, and surveyors appointed by charterers (Charterers' Exhibits 2, p. 13 and 4, p. 7) of 545,033 barrels (which Owners say was incorrectly calculated), less the 538,250.09 gross barrels on board on arrival, as calculated by Saybolt, based upon ship tank ullages, less 1,947 barrels of water.

[4] This data was obtained from a survey and photographs of the RIO (ex TRIUMPH) (Charterers' Exhibit 34) while being dismantled by the breakers in China. The report, dated March 27, 1986, was prepared by McLaren, Dick & Co. (Asia) Ltd. for the account of Clyde & Co. in an unrelated matter.

> *. . . a spur line of smaller diameter which for the most of its length ran inboard and parallel to the main (cargo) line on the outboard side of the starboard girder in the forward bay of No. 3 centre tank. At the forward end the spur line was fitted with a (gate type) suction valve and short bend which was connected to a "tee" piece in the main line adjacent to bulkhead No. 2/3. At the aft end the spur line turned inboard, and passed through the side girder into the starboard aft corner of the "enclosed area" where it dropped down and terminated in a suction strum.*

It is Charterers' contention that they have at the least established that vessel's ullage readings were unreliable and, therefore, should be disregarded in favor of shore readings. Charterers have amended their claim to reflect the loss of 11,938.35 bbls. (based on net shore-to-shore readings) for $371,879.60.

What appeared at first sight to be a fairly simple case of a short delivery developed over the seven hearings into a complex matter involving allegations of cargo stealing by this vessel, as well as other vessels operated by the same managers, perjury by the vessel's Chief Engineer, alterations to the Deck and Engine logs, etc.

Because of the alleged conversion of cargo, Charterers are also now seeking treble damages (under the RICO[5] statute), together with an award for interest, costs and reasonable attorneys' fees.

Owners deny Charterers' allegations, both as to the cargo shortage and the cargo conversion. Owners conceded that

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[5] Racketeer Influenced Corrupt Organizations Act

vessel's ullages at the loading port were incorrect and they agreed to be bound by the shore or Bill of Lading figures.

Owners similarly agree that the vessel, upon arrival at Corpus Christi, had the quantity stated by the Charterers and that the apparent in-transit loss represented the 3,198 bbls. of free water, or 1,251 bbls. increase of free water during the voyage. They attribute this increase to water settling out of cargo.

Owners furthermore dispute that the cargo had a BS&W of 0.06%. They alleged that the cargo at Nigg Terminal was not the same for which the Quality Certificate was issued showing API of 39.2 as opposed to 38.4 determined at Corpus Christi. As a result of this inconsistency, they asserted that the BS&W of 0.06% was in doubt and would account for the increase of free water during the voyage.

Finally, Owners dispute that the McLaren report at the demolition yard in China had any probative value because Owners were never invited to attend, and furthermore Owners contend that the report itself is not authenticated.

Owners have accepted the loadport shore figure as the controlling quantity on the grounds that vessel's calculations contained obvious errors.[6] The loadport vessel ullage figures were about 5,000 bbls. greater than the shore (Bill of Lading) quantity. With respect to the discharging port ullages, the panel has decided to accept the shore figures for the calculation of cargo delivered because of the imprecise cargo volume determination in centertank No. 3. Put another way, it is obvious that, given the above modifications to the No. 3 centertank of the TRIUMPH, the tank ullages cannot be relied upon to determine how much cargo had been loaded on board and/or delivered by the vessel. We base this decision on our

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[6] Owners' Main Brief, p. 5

conclusion that the modifications found in the No. 3 centertank (in China during the scrapping operation) were existent on board the TRIUMPH at the time of this voyage.

At this time, we do not make a determination as to whether or not Owners were privy to the modification as a pre-existing condition when (or after) they acquired the vessel, or whether Owners in fact arranged for these structural changes. It is, however, apparent that the existence of the retaining area in the No. 3 centertank rendered vessel's tank measurements unreliable.

In view of the above conclusions, there is no need to deal with the changes of the API or any other data relating to the observed data with respect to cargo on board the vessel. Using the shore figures for the loading and discharging ports, the panel concludes that the vessel failed to deliver 7,497.41 net bbls.[7] of Beatrice Crude Oil. The panel accepts the CIF value of $31.15[8] as the proper measure of damages which resulted in a loss to Charterers of $233,544.32. We also award interest at the rate of 9.5% per annum from March 30, 1984 to the date of this award.

Charterers have raised the issue of RICO as a basis for their claim for treble damages. The panel has carefully considered the arguments, particularly in view of the *Shearson/American Express v. McMahon* decision,[9] where the court found that RICO claims indeed are arbitrable; and *Valero*

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[7] Which is the difference between 539,999 net bbls. at the loadport as Bill of Lading quantity (Owners' Exhibit 3-a) and 532,501.59 net bbls. at the discharging port (Charterers' Exhibit 6 - Saybolt Shore Tank Gauging Report dated March 30, 1984, "corrected" report to change water gauge and barrels, also changing "net standard volume") .

[8] Charterers' Exhibit 9

[9] 107 S.Ct. 2332 (1987)

Refining Inc. v. M/T LAUBERHORN,[10] where the Court of Appeals for the Fifth Circuit found Valero's RICO claim to be arbitrable in a maritime setting.

Having concluded that the panel is empowered to and should consider a RICO claim asserted in arbitration, additional briefing on the statute and its application to this case, together with the claim for punitive damages, should be made of the parties before the panel decides the remaining issues/claims.

The panel defers its decision on Charterers' claim for attorneys' fees and costs incurred until the final award. Likewise, the panel reserves its right to deal with Owners' interest claim for the late payment of freight in the final award. The costs for the hearing transcripts are to be equally shared by the parties.

The arbitrators' fees, as set forth in Appendix A attached hereto, are an integral part of this award and are the joint and several obligation of both parties. Payment of the fees is to be made pursuant to the directions contained in Appendix A.

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[10] 813 F. 2d 60 (5th Cir. 1987)

THE AWARD:

The panel directs Owners to pay to Charterers the sum of $332,138.41, which we arrived at as follows:

1. Value of cargo short delivered $233,544.32

2. Interest on Item 1. at 9.5% p.a. for the period from March 30, 1984 to the date of this award 98,594.09

$332,138.41

If this award has not been satisfied in full within 30 days from the date of this award, interest at the rate of 10% per annum shall resume on the principal amount and continue to run until payment in full has been made or the award has been reduced to judgment, whichever first occurs.

/s/
Alexis Nichols

/s/
Louis P. Sheinbaum, Esq.

/s/
Manfred W. Arnold, Chairman

New York, New York
September 7, 1988

APPENDIX A

The panel's fee for rendering this award is $31,200, or $10,400 per arbitrator.

Each side is to pay each arbitrator the sum of $5,200. The panel reserves its right to reallocate the fees in its final award.

The liability for the panel's fees is joint and several.

(In the Matter of the Arbitration
between
Triumph Tankers Ltd., as Owners
of the TRIUMPH
and
Kerr McGee Refining Corp.,
as Charterers)

New York, New York
September 7, 1988

APPENDIX B
(TO FINAL AWARD WHICH IS AT PETITIONER'S APPENDIX 20a *et seq.*)

The panel's fee for rendering this award is $54,000, or $17,000 each for Messrs. Sheinbaum and Arnold and $20,000 for Mr. Nichols.

Although the arbitrators' fee is assessed in full against the Owners, payment in the first instance is to be made in full by the Charterers.

The arbitrators' fee is the joint and several obligation of both parties.

(In the Matter of the Arbitration
between
Triumph Tankers Ltd., as Owners
of the TRIUMPH
and
Kerr McGee Refining Corp.,
as Charterers)

New York, New York
March 28, 1990